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DANIEL J. MILLER, APPELLEE, V. I. J. WEHRMAN, APPELLANT.

FILED APRIL 10, 1908. No. 15,151.

1. **Real Estate Agents:** REVOCATION OF AUTHORITY. A mere naked authority to sell land may be revoked or modified at any time by the principal, where the instrument granting the authority is not given for a valuable consideration or does not create in the agent an interest in the real estate.
2. **Principal and Agent:** AUTHORITY OF AGENT: NOTICE: UNAUTHORIZED ACTS. Where the act of an agent is void unless his authority therefor is in writing, one dealing with the agent is bound with notice of the terms and conditions of the instrument creating the power, and a contract made by the agent in the name of his principal, if beyond the scope of such authority as evidenced by the writing, is not binding on the principal.
3. **Evidence** in this case examined, and found to sustain the decree of the district court.

APPEAL from the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Affirmed.*

Cole & Brown, for appellant.

F. H. Stubbs and *G. W. Stubbs, contra.*

ROOT, C.

G. D. Follmer & Son is a firm engaged in the real estate business in the city of Nelson, Nebraska. Plaintiff is the owner of a farm in Nuckolls county. June 22, 1903, plaintiff signed the following statement, and delivered it to Follmer & Son:

"Contract. I, the undersigned D. J. Miller, of Mont Clare, of the county of Nuckolls, and state of Nebraska, do hereby authorize G. D. Follmer & Son, of Nelson, to bargain and sell the property described at even number herewith at the price set forth, and do hereby agree that I will convey said property on the sale of the same. I further agree that the above described property shall be left with said G. D. Follmer & Son for sale as above for

the term of six months from date thereof, and thereafter until 30 days' notice is given of the withdrawal of said property from said G. D. Follmer & Son's hands in writing, and if said G. D. Follmer & Son sell, or are in any manner instrumental in selling, said property during said time I will take $4,000 net. Dated this 22d day of June, 1903. (Signed) D. J. Miller."

January 9, 1904, there was added to said instrument the following words and figures: "This contract renewed 1-9-04. Privilege given to list with other agents. Price $4,000; $100 commission. (Signed) D. J. Miller. G. D. Follmer & Sons." Attached to the writing is a description of the land and the improvements thereon, and its situation with regard to markets, schools and churches.

G. D. Follmer & Son claim to have sold this land under the authority of said writings to defendant, and a member of said firm, purporting to act as plaintiff's agent, signed a written contract for the sale of the land for $4,000. This contract was recorded in the office of the registrar of deeds of Nuckolls county. This action is for the purpose of canceling said contract and its record, and to quiet title to said land in plaintiff. Defendant has filed a cross-petition for specific performance of the contract, and alleges he paid Follmer & Son for plaintiff $100 and tenders $3,900, the remainder of the purchase price, to plaintiff. Plaintiff prevailed in the district court. Plaintiff claims Follmer & Son were not authorized to sell the land for $4,000, for the reason, as he testifies, that on the 22d day of August, 1904, he wrote said firm that he had increased the price for the farm to $4,500. Follmer & Son, on the other hand, claim they did not receive the notice till September 15, 1904, and that they consummated the sale October 11, 1904, the date of the contract with defendant; that they were entitled to 30 days' notice of any change in the terms of their contract, and that within 26 days of receipt of plaintiff's notice of the change in the price for which the land might be sold, they had completed the sale to defendant and had signed the contract.

1. Plaintiff was entitled to a decree, and the judgment of the district court will be affirmed. The instrument signed by plaintiff and Follmer & Son is a mere naked authority from the principal to his agent, and not being coupled with an interest, nor given upon a consideration, was revocable at any time by the principal, although thereby he might subject himself to damages at the suit of the agent. Mechem, Agency, secs. 204, 207, 208, 209; *Milligan v. Owen,* 123 Ia. 285; *Cadigan v. Crabtree,* 179 Mass. 474, 88 Am. St. Rep. 397; *Glover v. Henderson,* 120 Mo. 367, 41 Am. St. Rep. 695.

When Follmer & Son received notice that the price for which the land might be sold had been increased from $4,000 to $4,500, the firm's power to sell was altered and changed, and it could not bind plaintiff in a contract for a smaller sum than the $4,500. Whether Follmer & Son could maintain an action for the value of services rendered up to said time, or whether it had any legal claim on plaintiff, is immaterial to this inquiry. The record is barren of any evidence that the agent had done anything whatever to secure a purchaser for the land before the receipt of Miller's notice. The fact is the power of the firm to sell the land for $4,000 expired with the receipt of this notice. Defendant does not claim to have been misled by any ostensible authority given Follmer & Son. He says he did not see the written authority till after plaintiff refused to acknowledge the contract signed in plaintiff's name by Follmer & Son. He was charged with notice that Follmer & Son's authority to bind plaintiff must have been in writing. Had he insisted on an inspection thereof, he would have found on that part of the document that contained a description of the land a notation which H. R. Follmer says he placed there September 15: "Notified of raise in price Sept. 15, '04." So that the question is simply one of power on the part of Follmer & Son to bind plaintiff: to sell the land for $4,000. That power Follmer & Son did not have. *Frahm v. Metcalf,* 75 Neb. 241; Mechem, Agency, sec. 273.

2. The record will warrant a finding of fact that Follmer & Son received the notice more than 30 days before it sold to defendant. Plaintiff testified positively that on the 22d day of August, 1904, he addressed an envelope to Follmer & Son, Nelson, Nebraska, and affixed thereto a two-cent postage stamp; that he inclosed in said envelope the notice; that he personally handed the letter to a rural mail carrier at one of the letter boxes while the carrier was on duty engaged in taking up and distributing mail. He corroborated his testimony concerning the transmission of the notice by the production of a diary wherein he had entered his transactions for that day, and in regular order we find a notation of the fact he had sent notice to Follmer & Son that the land should not be sold for less than $4,500. Plaintiff had kept a diary since 1876, and the book containing this entry was one of a series used by him for that purpose. He testified that he either wrote up the diary the evening of each day or within a day or two of the happening of the events. On the other hand H. R. Follmer, a member of the firm, says that the letter was not received at the Nelson post office by the firm till September 15; that they received mail every day, and that he himself received plaintiff's letter; that he immediately made a notation of the fact and date in the firm's books; says he has lost or mislaid the letter itself, and does not know what has become of the envelope, nor does he remember the date of the impression made by the receiving stamp thereon; that he did not anticipate any trouble, and did not preserve the envelope. Proof that a letter properly addressed and stamped was placed in the mails is *prima facie* evidence that such letter, in the regular course of business, was delivered to the addressee. *McDermott v. Jackson,* 97 Wis. 64. This presumption may be rebutted by any relevant evidence; but, even though the addressee should testify positively he did not receive the letter, the weight of the evidence must be submitted to the trier of fact, and a decision upon the one side or the other will be supported by the evidence. *Pennypacker*

v. Capital Ins. Co., 80 Ia. 56, 20 Am. St. Rep. 395; *Hedden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276; *Long-Bell Lumber Co. v. Nyman*, 145 Mich. 477.

We know no reason for not applying the rule where the dispute is concerning the time of delivery; it being presumed that officers do their duty and that public affairs are transacted in the ordinary routine and course of business. Follmer was a witness hostile to plaintiff. His interest was bound up with that of defendant. His authority, if any he had, under the amended contract prior to the receipt of the letter, was to sell for $4,000, and he would be entitled to a commission of $100, and yet he sold for $4,100, and reported the sale as for $4,000 only. On the entire record, we are satisfied the trial judge was right, and we therefore recommend that his judgment be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. ADAMS LUMBER COMPANY ET AL.

FILED APRIL 23, 1908. No. 14,685.

1. **Monopolies: AGREEMENT IN RESTRAINT OF TRADE.** An agreement between retail lumber dealers, whereby one dealer agrees to "protect" the other by asking a higher price than the other for the same bill of lumber submitted to both for prices, is in violation of the statute.

2. ———: ———: **INJUNCTION.** An agreement made by a number of the retail lumber dealers in a county to sell lumber and building materials within the county at certain fixed prices and to divide territory is illegal and void as in restraint of trade and competition, and will be restrained and enjoined.

3. ———: ———: ———. Under the circumstances disclosed in this

case, *held* that the action of the secretary of the Nebraska Lumber Dealers Association in a number of transactions detailed in the opinion was in violation of law as tending to prevent or preclude free competition in the sale of lumber and building materials in this state and being in restraint of trade, and that, under the facts disclosed, the officers and directors of said association are chargeable with knowledge of such acts. *Held, further*, That all such proceedings upon his part should be perpetually enjoined, and that the defendant association and its officers and directors should also be perpetually enjoined from doing or performing, and from permitting or allowing said secretary or his successors or any officers of said association to do or perform, any such unlawful acts, and from carrying on any such practices or proceedings in violation of the statutes of this state prohibiting combinations in restraint of trade.

ORIGINAL suit by the state to restrain the defendants from unlawfully combining in restraint of trade. *Injunction allowed as to certain defendants.*

W. T. Thompson, Attorney General, W. B. Rose and *H. M. Sinclair*, for plaintiff.

Baldrige & De Bord, E. J. Clements, John S. Kirkpatrick, Courtright & Sidner, Flansburg & Williams, Hubbard & Burgess, Strode & Strode, E. B. Perry, R. R. Dickson, W. Switzler, R. E. Evans and *Charles J. Traxler, contra.*

LETTON, J.

This action was brought by the attorney general of the state of Nebraska under the provisions of the anti-trust act of the legislature of 1905, known as the "Junkin Act" (laws 1905, ch. 162). The defendants, who are several hundred in number, are corporations, partnerships and individuals who are engaged in the business of dealing in lumber in the state of Nebraska, and it is alleged that they own and operate more than 700 lumber yards in the state doing at least 90 per cent. of the retail business in lumber and cement and other building materials.

The petition charges: "That said defendants are now

and for the last several years have been intentionally, wilfully and unlawfully combining, conspiring and conniving together and with each other and with other persons and corporations unknown to plaintiff for the purpose of restraining trade and commerce in lumber and building materials and monopolizing and attempting to monopolize said trade and commerce within said state, and for the purpose of dividing among themselves the said trade and commerce in certain districts and localities within said state, and for the purpose of fixing the prices at which they would sell to the public lumber and building materials, and for the purpose of preventing competition among lumber dealers, and for the further purpose of destroying competition and driving out of business competitors in said line of business; all of which was wilfully and unlawfully done by said defendants to the end that they and each of them might have a monopoly of said trade and commerce, and that they and each of them enjoy unreasonable and unconscionable profits from the operation of their said business; that in pursuance of the combination, pool and conspiracy aforesaid said defendants are now and have been able for the last several years to control and fix the prices of lumber and building materials generally throughout the state of Nebraska, and to restrict trade and commerce in said commodities, and to destroy competition and to drive out of business competitors in said business." The petition further charges that to aid in carrying out its purposes the defendants organized what is known as the "Nebraska Lumber Dealers Association," of which a number of the defendants constitute the officers; that no person or corporation can become a member of said association unless he or it is "regularly engaged in the retail lumber trade, carrying an assorted stock of lumber, sash, doors and other building material reasonably commensurate with the demands of his community, and that wholesale dealers who are in sympathy with the association may become honorary members thereof." The articles of the association are set

forth at length, and it is charged that, "as interpreted, enforced and practiced by the members and officers of said association, they result in giving to the officers and members a monopoly in the retail lumber business, and allow them to destroy competition and to restrain trade and commerce within the state." The petition further charges that the secretary issued a bimonthly list of lumber dealers within the state of Nebraska, showing those who are and who are not members of the association, the purpose being to advise wholesale dealers as to which lumber dealers are members of the association and which are not members and therefore not entitled to the same terms and treatment as the regular members. It is further charged that the understanding was that members of the association who had lumber yards in the same city or village should charge to the consumer the same prices for lumber and building materials, which understanding has been and now is being kept by such members. The petition further charges that by means of the monopoly and combination so formed the defendants have unlawfully increased the prices of building materials and are destroying competition in the lumber trade of Nebraska. The prayer is for an injunction to restrain the defendants from connection with or participation in the Nebraska Lumber Dealers Association; that the association be dissolved; that the defendants who are domestic corporations be ousted from their corporate powers and franchises, and that each and all of the defendants be enjoined from in any manner preventing or limiting competition in the sale of lumber and building materials, from fixing or controlling the prices thereof, or from entering into any agreement to carry out any restriction of trade.

The answers of the several defendants, except for some unimportant admissions, amount in effect to a general denial of the allegations of the petition. The cause was referred to the Honorable A. M. Post, as referee, to take the evidence and report his conclusions of fact and law. The referee proceeded to take the testimony and hear the

case, and filed a report, which in its amended and final form is as follows:

"FINDINGS OF FACT.

"(1) The Nebraska Lumber Dealers Association, an incorporated voluntary association, was organized in or previous to the year 1892, being composed of retail lumber dealers of Nebraska as active members, with wholesale dealers and manufacturers and their representatives as honorary members.

"(2) On the 22d day of January, 1903, said organization adopted new and amended articles of association which, so far as material to this controversy, are as follows:

" 'We realize the convenience, if not the necessity, of the retail lumber dealers to every community, and we are interested in the promotion of the general welfare and the perpetuation of the retail lumber business. We recognize the absolute right of every person, partnership or corporation to establish and maintain as many retail yards as he or it may see fit. We recognize the right of the manufacturer and wholesale dealer in lumber products to sell lumber in whatever market, to whatever purchaser, and at whatever price they may see fit. We also recognize the disastrous consequences which result to the legitimate retail lumber dealer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealer of accurate information as to the nature and extent of such competition where any exists. And, recognizing and appreciating the advantage of co-operation in securing and disseminating any and all proper information for our mutual convenience, benefit or protection, we have organized this association and have adopted the following articles for the government of our affairs:

" 'Article I.

" 'Name and Territory.

" 'The name of this organization shall be the Nebraska Lumber Dealers Association, and the territory embraced by it shall be the state of Nebraska and that part of

states adjoining and tributary to it where interests are mutual.

"'Article II.

"'The Object.

"'The object of this association is and shall be to secure and disseminate to its members any and all legal and proper information which may be of interest or value to any member or members thereof in his or their business as retail lumber dealers.

"'Article III.

"'Limitations and Restrictions.

"'Section 1. No rule, regulations or by-laws shall be adopted in any manner stifling competition, limiting production, restraining trade, regulating prices or pooling profits.

"'Section 2. No coercive measure of any kind shall be practiced or adopted toward any retailer, either to induce him to join the association, or to buy or to refrain from buying of any particular manufacturer or wholesaler; nor shall any discriminatory practices on the part of this association be used or allowed against any retailer for the reason that he may or may not be a member of the association, or to induce or persuade him to become such member.

"'Section 3. No promises or agreements of any kind shall be requisite to membership in this association, nor shall any penalties be imposed upon its members for any cause whatsoever.

"'Article IV.

"'Membership.

"'Section 1. Regular Members. Any person, firm or corporation within the territory of this association regularly engaged in the retail lumber trade, carrying an assorted stock of lumber, sash, doors and other building material reasonably commensurate with the demands of his community, shall be considered a retail lumber dealer, and be eligible to membership in this association. Each member entering one yard shall pay annual dues of $7,

payable in advance. Any member desiring to enter more than one yard shall pay additional dues for each additional yard.

" 'Section 2. Honorary Members. Any wholesale dealer, manufacturer or manufacturer's agent, who shows himself to be in full sympathy with this association and its members, may become an honorary member, and receive the benefits of such advertisement as the association prescribes in listing such honorary members in each bulletin issued to the trade by the association, by paying $5 annually into the association.

" 'Article V.

" 'Officers.

" 'Section 1. The affairs of the association shall be managed by a board of ten directors, including the president, vice president, treasurer and secretary, who shall be *ex officio* members thereof. The secretary shall issue bimonthly a printed list of all members of the association in good standing, and shall mail copy thereof to each member. He shall also mail a copy of said list to the secretaries of such other associations as will reciprocate. * * *

" 'Section 4. Executive Committee. The president, vice-president and secretary, *ex officio,* are constituted the executive committee of this association. In all matters relating to complaints made to this association between the sessions of the board of directors the said committee shall have the same power as those conferred upon the board of directors. Upon request of the secretary said committee shall convene and adjust such matters as are not clearly defined by the articles and by-laws, or such other questions as he deems of great importance to the association.

" 'Article VI.

" 'Section 1. Reports to Secretary. Any member of this association having knowledge of a sale by a manufacturer or wholesale dealer or his agent to a consumer within the territory of such member may notify the secretary of this

association in writing, giving as full information in reference thereto as practicable, such as date or dates of shipment and arrival, car number and initials, original point of shipment, names of consignor and consignee, and purpose for which the material was or is to be used, and such other particulars as may be obtainable. Such notice, if filed at all, must be sent with or without information in detail, within thirty days after receipt of shipment at point of destination, and no notice shall be filed of any such sale or shipment occurring within fifteen days after date of said member's certificate of membership (said membership to date from the first issue of the membership list succeeding the acceptance of his application). Upon receipt of such written notice the secretary shall immediately verify such report, as far as practicable, and under the direction of the board of directors shall notify the members of the association of such sale or shipment by such manufacturer or wholesaler.

"'Section 2. Exceptions. No notices shall be filed of the following sales or shipments, the same being regarded as wholesale trade: To railroad or transportation companies, packing houses, regular dealers in grain operating a line of elevators, warehouses or corncribs, state or United States governments, regular bridge building companies, extensive coal mine operators, manufacturers where all material purchased enters directly into the article manufactured, or becomes a part of the article offered for sale, or used in boxing, crating or shipping the same; provided that none of those named are engaged as contractors in the erection of buildings for other than their own use. Also sales of desks, bank or drug-store fixtures, or in the case of house mill work, where plans, details and specifications are furnished by owner, or where the strictly special work, exclusive of regular stock, sash, doors, base, casings, columns, mouldings, flooring and finishing lumber for cornice and shelving, amounts to $500 or more.

"'Section 3. All sales or shipments made to customers by commission merchants, agents or brokers, shall be con-

sidered as though the same were made directly by the manufacturer or wholesaler from whom such commission merchant, agents or brokers secure such lumber or shipments.

"'Section 4. Each member, when he joins this association, and once each year thereafter (and oftener if the board of directors shall request it), is expected to furnish the secretary, when called upon to do so, a list of those manufacturers and wholesalers and their agents from whom he makes purchases of lumber and other building material.'

"On the 8th day of February, 1906, said articles of association were further amended by striking therefrom the last clause of section 1 of article 6 thereof, to wit: 'And under the direction of the board of directors shall notify the members of the association of such sale or shipment by such manufacturer or wholesaler.'

"(3) The alleged purpose, and, so far as the evidence discloses, the real purpose, of such amended articles was to conform said association in its purposes and practices to the anti-trust laws of Nebraska as expounded by this court in the case of *Cleland v. Anderson,* 66 Neb. 252.

"(4) Although said articles of association were not signed by the members of said association, the defendants, except as hereinafter stated, have voluntarily paid the fees and dues prescribed by said articles, and have otherwise conformed to the rules and regulations of said association, and have continuously enjoyed the privileges and benefits conferred, and have thereby assumed the obligations of members of said association.

"(5) On and previous to the 5th day of May, 1904, the Barnett Lumber Company, a corporation engaged in business as a retail lumber dealer at McCook, Nebraska, combined with the W. C. Bullard Lumber Company, a corporation engaged in business as a retail lumber dealer at McCook, for the purpose of regulating the prices of lumber and other building materials, and for the division of trade, in said city and adjacent territory; and said

defendant and the said W. C. Bullard Lumber Company, a nondefendant, by means of such combination did, at and before the date aforesaid, control the prices of lumber and other building materials in said city and territory. There is also evidence tending to prove like combinations for the purpose of regulating prices by certain defendants, and by certain defendants and strangers to this record, within the counties Seward, York, and Cass, but the evidence fails to connect the Nebraska Lumber Dealers Association with such combinations or either thereof, and does not sustain the charge of unlawful combination against such other defendants.

"(6) Except as otherwise hereinbefore stated, the evidence fails to prove any agreement, combination or conspiracy by all or any of the defendants to pool profits, to regulate prices of building material, or for the division of territory for the purpose of trade; and the claim of the state is predicated wholly upon the alleged unlawful combination or agreement of defendants to drive out of business wholesalers and manufacturers dealing directly with consumers, and to prevent such wholesalers and manufacturers from dealing directly with consumers.

"(7) Complaint has been made from time to time by members of the association to the secretary thereof on account of the consignment of building material in carload lots to nondealers, and the secretary has, by correspondence, protested to such consignors against such practice as violative of the 'ethics of the trade.' But the evidence fails to prove that the fact of such complaints or of such consignment, or the names of the consignors, or either or any thereof, were communicated to or known by other members of the association. And the evidence fails to prove the existence of any rule, regulation, usage or understanding for the furnishing of such information, or for the imposing of any penalty whatever for the sale by wholesalers or manufacturers to nondealers; and the members of said association are, and have been at all of

the times named in the petition, at liberty to purchase building material in any and all markets and from any and all dealers, and are not, and have not been, bound by any rule, regulation or understanding to withdraw or withhold patronage from wholesalers dealing directly with consumers.

"(8) The Nebraska Lumber Dealers Association has never transacted any business, and the members thereof, including these defendants, except as hereinbefore stated, were at the date of the commencement of this action engaged in competition among themselves as dealers in lumber and other building material.

"(9) The evidence fails to prove any agreement or combination by the defendants or any of them, or between any of the defendants and strangers to this record, except as hereinbefore stated, to drive out of business or to place any restriction upon or interfere with the business of lumber dealers who are nonmembers of the Nebraska Lumber Dealers Association, or to compel such nonmembers to affiliate with said association.

"(10) The defendants, except as herein stated, were not at the date of the commencement of this action combining or conspiring together or with others for the purpose of restricting trade or commerce, or of monopolizing any part of the trade and commerce of the state of Nebraska.

"(11) The defendants, except as above found and stated, were not at the date of the commencement of this action monopolizing any part of the trade and commerce of the state of Nebraska.

"(12) The following named defendants, to wit, the S. A. Foster Lumber Company; the Searle & Chapin Lumber Company; George A. Hoagland; the Bowman-Kranz Lumber Company, and Thomas Ostergard & Company, are not, and were not at the date of the commencement of this action, affiliated with the Nebraska Lumber Dealers Association.

"CONCLUSIONS OF LAW.

"1. The purposes of the Nebraska Lumber Dealers Association as declared in its articles of association are not unlawful.

"2. The declared purpose of said association being consistent with the provisions of the anti-trust laws of Nebraska, the defendants are not, from the mere fact that they are members of said association, chargeable with acts violative of such laws done without their knowledge or consent by fellow members thereof.

"3. The facts as proved and found do not, except as herein otherwise stated, amount to an unlawful trust as defined by statute of Nebraska.

"4. The facts as proved and found do not, except as herein otherwise stated, show any agreement, combination or conspiracy in restraint of trade as defined by statute of Nebraska.

"5. The facts as proved and found do not, except as herein otherwise stated, show any agreement, combination or conspiracy to monopolize any part of the trade and commerce of the state of Nebraska.

"6. The defendants, except as herein otherwise stated, were not at the date of the commencement of this action guilty of monopolizing any part of the trade and commerce of the state of Nebraska.

"7. The unlawful combination between the defendant, the Barnett Lumber Company, and the W. C. Bullard Lumber Company is presumed to have continued to the commencement of this action, and the state is, as against said defendant, entitled to judgment as prayed.

"8. Except as to the defendant last above named, the petition should be dismissed.

"Dated April 11, 1907. A. M. POST, Referee."

To these findings of fact and conclusions of law the state and the defendant Barnett Lumber Company filed exceptions, upon which arguments have been had and briefs submitted, and the question now before us is whether the report of the referee should in all things be

adopted and judgment rendered accordingly, or whether the exceptions should be sustained.

The report of the referee may properly be considered in two general divisions; that part which treats of the organization, purposes and acts of the Nebraska Lumber Dealers Association, and that portion which is concerned with certain local combinations alleged to have been formed by some of the defendants in unlawful restraint of trade within the state.

1. We will first consider the evidence relating to the acts of the Nebraska Lumber Dealers Association and those of its secretary. The Association was organized about the year 1892. At the time it was organized and for a period of years thereafter one of its expressed objects was to prevent the competition of wholesale dealers in selling directly to contractors and other consumers, and to prevent wholesalers from selling to dealers who did not carry a stock of 75,000 feet and maintain a permanent yard.

The legality of the association was questioned in the case of *Cleland v. Anderson*, 66 Neb. 252, and it was there held that its objects and purposes were unlawful and in contravention of section 1, ch. 91*a*, Comp. St. 1907 (Ann. St. 1907, sec. 12000). The opinion in this case was handed down November 6, 1902. In the latter part of January, 1903, the association held its 13th annual convention at Lincoln, Nebraska. In the printed report of that meeting is contained the president's address, from which the following is quoted: "The board of directors has so successfully manipulated the affairs of the association that serious contention has not arisen, and all kinds of differences, all claims and all complaints have been adjusted to the seeming satisfaction of all concerned, and the association is now at peace with all the world *excepting a few poachers;* but as to them there *has been and is still being maintained an effective warfare.* This element is still troublesome, but is becoming rapidly subservient, and several jobbers who were hostile a few

months since are now enrolled with us and rendering valuable aid in the conquest of others." The president further speaks of the case of *Cleland v. Anderson, supra,* disclaims any intention to be other than law abiding, and continues: "Desiring to place ourselves right in the eyes of the law, as we have ever been from the moral standpoint, important measures will be presented at this meeting for your consideration." This referred to amended articles of association which were presented and adopted at the meeting. These articles are set forth at length in the referee's report. They remained without change until the 8th day of February, 1906, when they were amended by striking from the last clause of section 1 of article 6 the provision that the secretary "under the direction of the board of directors shall notify the members of the association of said sale or shipment by such manufacturer or wholesaler."

A large mass of evidence both oral and documentary has been submitted with reference to the manner of carrying on the affairs of the association since 1903 until this time. The testimony of the officers and directors of the organization is, in substance, that those purposes of the association which are not prohibited by law and which are advantageous and commendable in themselves have been the principal object of its activities since that time, and specific and categorical denials have been made by these witnesses of any practices, rules, actions or operations on the part of the executive officers or of the board of directors or of the members of the association, the object of which is anywise in contravention of the statutes. It appears, however, that for ten years, from 1892 to 1902, the practices of the association were of a nature clearly at this time unlawful, and that secretary Critchfield has continued his activities very much along the same line as before the change of articles took place. The articles of the association, as amended and now existing, recite, as one of the reasons for the existence of the association,

"the disastrous consequences which result to the legitimate retail lumber dealer from direct competition with wholesalers and manufacturers," and "the importance to the retail dealer of accurate information as to the nature and extent of such competition where any exists." Another reason given is "the advantage of co-operation in securing and disseminating any and all proper information for our mutual convenience, benefit or protection." It was mainly for these purposes that the association was originally organized. The provisions that members must communicate to the secretary any matters within their knowledge of "poaching" was amended so as to make it permissive in form. But the amendments left intact the provision for notice to be given to the secretary of a sale "*within the territory*" of any member. These notices were to be given in case of a sale by a manufacturer or wholesale dealer or his agent to a consumer within the territory of such member, and were to contain "as full information in reference thereto as practicable, such as date or dates of shipment and arrival, car number and initials, original point of shipment, names of consignor and consignee, the purpose for which the material was or is to be used, and such other particulars as may be obtainable." The notices, if sent, must be within 30 days after the receipt of the shipment at the point of destination. The evidence shows that this plan or system of keeping tab upon sales by wholesalers to other than "regular dealers" was carried out with considerable frequency by members of the association, and that the enforcement of the "ethics of the trade" against "poachers" was carried on by Secretary Critchfield after the amendments the same as had been done before. But, instead of notifying all the members of the association of the encroachments of the poacher," in order that they may withdraw their patronage from the said "poacher," the secretary takes the matter up with the violator of the "ethics of the trade" and calls for an "explanation."

The evidence shows that associations of retail lumber

dealers of much the same character as the Nebraska association exist in nearly all the states in the Mississippi Valley, and that, as with this association, the most active officer in their respective organizations seems to be the secretary. An association of secretaries exists, denominated the "Secretaries' Bureau of Information," which has its headquarters in Chicago, and of which one W. S. Hotchkiss seems to be the head. Hotchkiss attended a meeting of the Nebraska Lumber Dealers Association and explained the method of operation of this bureau of information, and the evidence shows that some arrangement was made by which each member of the Nebraska association became entitled to the services of this secretaries' bureau, and by this means pressure was brought to bear upon the wholesalers and manufacturers residing or doing business in states occupied by other associations. The Nebraska association sent delegates to the meetings of the secretaries' bureau and contributed to its support as late as July, 1906. An instance of the actual working of this bureau is as follows: A complaint was made to secretary Critchfield by a Hebron lumber company against a Chicago sash and door concern. This complaint was forwarded to Hotchkiss at Chicago to send to the offending Chicago manufacturer, with a request for an explanation. Afterwards the complaint, the letter of Hotchkiss to the Chicago company, and their reply thereto were returned by Hotchkiss to Critchfield, and a few days later Hotchkiss advised Critchfield as follows: "June 21, 1904. Mr. Bird Critchfield, Sec., Lincoln, Neb. Dear Sir: I enclose supplementary files in the complaint of the Hebron (Neb.) dealers v. Morgan S. & D. Co., Chicago, including their reply to my late communication to them. I think it would be wise for the Hebron dealer now to write the Morgan company making demand for 10 per cent. compensation for this shipment. We as an association or bureau dare not do it, but the injured dealers cannot be criticized for demanding it, whether they get it or not. They can plead the action of the Mississippi Valley

Manufacturers Association, who by resolutions have asserted the justice of such a claim and bound themselves by their act to pay them. I have recently through their secretary, Mr. Rhodes, collected $35 on such a shipment. Very truly yours, Geo. W. Hotchkiss, Secretary." The evidence fails to show whether this advice was taken, and whether any compensation was ever made to the dealers at Hebron. This transaction was in 1904, after the *Cleland* decision.

A typical case is set forth by certain correspondence between some lumber dealers in Havelock, secretary Critchfield and the offending wholesaler. In the first letter the Havelock dealers report to Critchfield the shipment of a car of yellow pine to that place, suggesting that they think it came from the Monarch Lumber Company, and was sent through a Lincoln firm, and asked Critchfield to let them know as soon as possible, because they also had an order with the Monarch people, and "that if it does this kind of business we will try and find another mill to place our orders with." Next appears a letter from Critchfield, as secretary of the association, to the Monarch Lumber Company at St. Louis, as follows: "Gentlemen: Notice has been received at this office that you shipped car No. 38,154 C., M. & St. P. to James Candy, Havelock, Nebraska, upon the order of the Godfrey Lumber and Coal Company of Lincoln, Nebraska. Please explain shipment, and oblige, yours very respectfully, ——, Secy." The next letter is in reply to this from the lumber company. It is apologetic in its nature, and in substance is to the effect that they shipped the car to the Godfrey Lumber and Coal Company, and not to Candy; that when the order was received they supposed that company had a yard at Havelock, and, hence, made the shipment. The letter concludes: "We have no intention whatever of infringing on the rights of any dealer. On the contrary we wish to protect them to the full extent, and if error has been made in this case we assure you that it was not intentional. Trusting that you will understand

this explanation as made, we are, yours very truly, Monarch Lumber Company, Trowbridge." The next letter is from Critchfield to the Havelock dealer, inclosing the explanatory letter. A letter follows from them to Critchfield, saying they will pass the matter, but if that company wish to sell them any more they will have "to cut out shipments to parties who order stuff where they did not have a yard." The last letter is from Critchfield to the Monarch Lumber Company, saying the Havelock member had written him "that the explanation of this occurrence was sufficient to have the matter passed without further notice." This correspondence took place early in 1905. But this practice did not cease with the taking effect of the Junkin act in July, 1905, as the following copies of letters from Critchfield's letter-book show: "7-1, 05. Clark & Nickerson Lbr. Co., Everett, Wash. Gentlemen. Notice has been received that your company shipped to Geo. M. Adams, Alliance, car of lumber which was used for W. D. Rumer in a store building. Please advise why you shipped to Mr. Adams, as he is not a lumber dealer at Alliance. Yours respectfully." "Aug. 23-05. Chas. Keys & Co., Wilsonville, Neb. Gentlemen: Yours of the 16th inst. received during my absence, and I note what you say about this man Dolph Ferrin of Beaver City. This is a new deal, and I am at a loss to know just how to locate this firm that this man represents. There will have to be some pretty slick work done to find out who is shipping the stuff in the south. Can't you find out through the bank to whom the drafts or pay is paid, or of the railroad agent how is (it) was marked on the bill of lading. Tell Phelps to try to work some deal at Beaver City, and if your cars come in there try to locate the shipper, and let me know. Yours respectfully." "Sept. 4th, '05. Coolidge-Shussler Co., Floodwood, Minn. Gentlemen: Just received letter from the regular lumber dealer at Cody, Neb., saying that your company had made two shipments to that point to other than the regular dealer there. Will you please advise the circum-

stances surrounding these shipments and whether or not you make a practice of selling to other than regular dealers. Yours respectfully."

These transactions are illustrative of many others which are in evidence. The usual procedure seemed to be that, when a local dealer heard of a shipment or a sale by a wholesaler to some person in his locality who was not a retail lumber dealer, he would immediately notify Critchfield, giving all the particulars he could obtain, in some cases being advised by Critchfield that the details were lacking and to endeavor to find out from the local bank through whom the draft was paid, or from the local railroad agent from where the lumber came, so that Critchfield might take the matter up with either the wholesaler direct or through the aid of the secretaries' bureau. When definite information was obtained, the secretary would write a letter to the wholesaler, asking for an explanation, and in several instances in evidence received satisfactory explanations, accompanied usually with an apology from the offending jobber and a promise to do better in the future. There is no evidence that notice was given to the members of the association generally as to whom the offending wholesalers or manufacturers were, and the entire transaction seems to be exemplified by the typical cases mentioned. There is no doubt that the effect of the communication upon the offending wholesaler was in all probability as great as if the result of contumacy on his part would be the publication of his name to each member of the association, but no penalty was sought to be collected from him, nor was he compelled to pay to the association or any member thereof any profit, fine or compensation on account of the sale. There is no evidence that shows that these complaints in actual practice were ever brought before the directors or members of the executive committee of the Nebraska association, or before the association as a body, but they were apparently attended to by Critchfield under his general authority as secretary of the association. One of the benefits

of the association held out by Critchfield to inquiring lumber dealers was the fact that through the operations of the association "poaching" had been well nigh terminated in this state. The fact seems to be that whatever success there was in this direction after the change of the articles of association was accomplished by the acts and doings of Critchfield clothed, as he apparently was, with the aggregated power of the associated lumber dealers of this state to restrict and injure the business of the manufacturer or jobber within the state. Since the repeal of the provision requiring the secretary to notify the members of "poaching" transactions, the only duty imposed upon the secretary in that behalf is that on receipt of a notice from a retail dealer he shall immediately verify the report, as far as practicable. While this is as far as the articles of association go, the notice would be useless if it remained buried in the archives of the secretary, and we think that under the articles as a whole it is intended that one of the duties of the secretary shall continue to be, as it had been before, to call the "unethical" sale to the attention of the offending wholesaler, and to endeavor to prevent and put a stop to such sales in the future. The evidence shows other details of organization tending to the same end, the prevention of competition between the wholesaler or jobber and the retail dealer in the sale of lumber, and the restraining of the power and ability of the individual purchaser to buy from any but the local dealer.

It is to be noted also that the same course is pursued with reference to the trade in cement. In cities and towns many miles of cement sidewalks are to be and are being built. Also many buildings are being erected of cement blocks manufactured by the builders, whether contractor or owner, but the association holds itself ready to call upon any manufacturer of cement for an "explanation" should he sell his product to any one except a regular lumber dealer. The testimony shows that wholesalers have refused to fill large orders to consumers for the reason that they dare not do it.

At the common law, contracts and combinations in restraint of trade were not in all cases illegal or void and unenforceable. It was only such contracts as created an unreasonable restraint of trade which the courts refused to lend their aid to carry into effect or award damages for the breach thereof. This is the doctrine of *Mogul Steamship Co. v. McGregor, Gow & Co.*, 21 L. R. Q. B. Div. 544; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; *Scottish Co-operative Wholesale Society, Limited, v. Glasgow Fleshers' Trade Defence Ass'n*, 35 Sc. L. R. 645; *MacCauley Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455.

The act under which this suit is brought is in its leading provisions almost a literal transcript of the federal Sherman anti-trust act of 1890. One of the questions most controverted in cases arising under the provisions of the Sherman act was whether the law prohibited all contracts and combinations in restraint of trade, or whether those alone which were unreasonable in their nature were inhibited by its provisions. It was contended that the common law meaning of the term "contract in restraint of trade" included only contracts which were in unreasonable restraint of trade, and that the use of the term in the statute was in its common law signification. But it is pointed out in the opinion by Mr. Justice Peckham in *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, that contracts in restraint of trade may be either reasonable or unreasonable; that "a contract may be in restraint of trade and still be valid at common law"; but that, "by the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which

is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress." This language is pertinent to the act under consideration so far as trade or commerce within the state is concerned, since the Nebraska law is almost a literal copy of the Sherman act, changing only its field of operation. In *Northern Securities Co. v. United States,* 193 U. S. 197, 331, the Sherman law was held to embrace and declare to be illegal every contract, combination or conspiracy of whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operated in restraint of trade or commerce. This is the proper construction to be placed upon our statute, and if the organization of the Nebraska Lumber Dealers Association directly or necessarily operates in restraint of trade and commerce in lumber and building material within this state it is an unlawful combination.

In order to determine whether the Nebraska Lumber Dealers Association is a combination in restraint of trade we must consider both the expressed purpose of the association and its actual operations. The articles of association, except as to the plan for suppressing "poaching," and the declared purposes of the association, as they now stand, do not run counter to the statute. Since the acts recited whose legality is doubtful were performed by the secretary of the association in his official capacity, the question presented is whether it is unlawful for the secretary of the association to do that which if done by the lumber dealer himself would be absolutely within his rights and in accordance with law. There can be no question but that, if a retail lumber dealer found that a sale had been made by a wholesaler with whom he dealt to a consumer or contractor in his immediate locality, he might lawfully write to that wholesaler complaining of the same and informing him that, if he carried on such competition, he would terminate business relations with

him. There is neither in law nor morals anything to prevent the dealer doing this for himself, or having it done for him by any other person whom he may select. This being the case, is it unlawful for a large number of retail dealers to combine together for this purpose, and to select one person as an agent for all of them who shall forward such complaints of this nature as any one of them may have? Neither the members nor the officers of the association have taken any action, so far as the evidence shows, to prevent any member from buying from any wholesaler, whether he sold to contractors and consumers or confined his sales strictly to the retail dealers, except to create and foster a spirit in the trade against such action. Nor do the articles of association directly forbid any such purchase. Nevertheless, we think no candid and unprejudiced individual can read the evidence in this record without becoming convinced that the complaints sent by the secretary of the association to the various offending jobbers and wholesalers produced a much more powerful effect upon their minds than if the notices had been sent or complaints made by an individual dealer, or by Critchfield himself as agent for a single dealer. The effect of the combination and association was probably as great upon the jobber or manufacturer as if the ordinary and usual methods of the more highly organized associations of this character were being used, such as sending notices to the entire retail trade that a certain jobber was selling to consumers, or such as assessing and collecting a portion of the profit for the benefit of the retailer whose trade was injured, or by fining members of the association who bought from the offending jobber. Before the amendment of its articles the practices of this association were apparently those which, as a matter of common knowledge, have been the common practice of other associations of like character. The implied threat in Critchfield's letters of complaint could not, since the passage of the anti-trust acts, be legally carried out, but of this fact it is probable the wholesale trade was not

informed, hence the effect was just as great as if the association was still invested with all its ancient powers of offensive warfare. Should any wholesaler refuse to be bound by the "ethics of the trade" as promulgated by the association, he would find that the rules and plans of the association would soon curtail, if not destroy, his business with the members of the association without reference to their locality, whether near to or distant from the place where the "poacher" has accommodated an owner with the material necessary for the construction of his building. The pressure is made, not upon the "irregular" buyer, but upon the wholesaler who dares to transgress. In short, the purpose is to put it out of the power of the contractor or consumer to buy, unless he submits to the force of the association and makes his purchase from whom and where they may dictate, and at the price demanded by the "regular" dealer, and the object seems to have been largely accomplished throughout the state. The power of the association is not confined to Nebraska. It is closely allied with similar associations of many other states, and those combinations are made use of, as we have seen, for the purpose of aiding in the suppression of competition, and in restraint of trade and commerce in this state.

The most difficult question on this branch of the case is whether the association should be held responsible for all of Critchfield's acts as secretary. If the evidence showed that all of his activities, those recited as well as other acts of his set forth hereinafter, were carried on with the knowledge of its officers and as a part of the general purposes of the organization, we would have no hesitation in holding that it had violated the law. The conviction that his conduct in upholding the "ethics of the trade" has trespassed upon the field forbidden by the statute has been arrived at from the whole record, not from an isolated instance, but from a multitude of circumstances and details throughout the case. But, on the one hand, there is positive testimony that the obnoxious acts

were unknown to and unauthorized by the officers of the association, and not required or authorized by its articles or a part of its purposes, and, on the other, there are circumstances which seem to render it strange and improbable that its officers should be in ignorance of his transactions. It is possible that some of the copies of letters which are shown to have been torn from secretary Critchfield's letter-books, of the contents of which he betrays a remarkable and suspicious ignorance, if produced, may have furnished the proof which is lacking, and a lesser quantum of evidence is sufficient to convince our minds, when taken in connection with the sinister presumptions furnished by this circumstance. The executive committee has all of the powers of the board of directors when the board of directors is not in session, and the record indicates that these powers are largely confided to secretary Critchfield. The articles provide that the secretary shall have "full voice" in the management. The members of the executive committee have interfered with him but very little, and yet they are so related to him and to the conduct of his business as secretary of the association that we think they are chargeable with notice of his doings. It seems that the board of directors and executive committee had frequent meetings at his office, which was the office of the company. It was their duty to know what he was doing and how he was managing the affairs of the combination. Copies of a part, at least, of the letters sent out by him were in the office, but no one seems to have inquired into his procedure. The powers of the secretary were great. He seems, in fact, in many particulars to have embodied for the most of the year the entire energies of the association. He makes up the list of the members, strikes them off, and adds to the list those that are regular and pay their dues. The list is published twice a month and sent out to all the members. The language of the secretary in his letters and in his private conversation is in entire harmony with his statements to the members themselves at their annual meeting,

and these statements show that he is personally active in protecting the interests of the members as they are defined in their articles. We are of the opinion that the directors of the association, its executive committee, and the members, who participate in and who are furnished with the report of those meetings, are chargeable with notice of the character of the secretary's work and of what he is doing.

The association has many purposes and activities which seem to be entirely proper and to furnish good, legal, and sufficient reasons for its existence. It has provided an insurance scheme for its members whereby fire insurance is furnished at a reasonable rate. It provides for the settling of disputes between the wholesaler and its members over the grades of lumber and other building material. It has taken up the question of demurrage with the railroad companies on behalf of its members, has endeavored to secure reasonable freight rates, and holds annual public meetings in which papers are read and discussions had of general interest to the lumber trade. Many lumber dealers, including the officers of the association, testify positively there are no rules, restrictions or understanding restricting their right to buy and sell where, when and to whom they please. They make no secret of the fact that they think it "not good ethics" to buy from a wholesaler who sells to their customers in competition with them. This is not a violation of any law, if done by a single individual upon his own account, but, under the drastic and stringent provisions of the statute, if two or more persons make an agreement with each other, or with a third person, to act for the members of the combination in such a manner that the tendency is to prevent or preclude free and unrestricted competition in the sale of goods, it is defined by the statute as a trust, and if its natural and probable effect is to stifle competition or restrain trade it is an unlawful act. We may concede that any statute which would have the effect of driving out of

business the retail dealer in the smaller towns and villages of the state would be in its final results a curse, and not a benefit, to the community, but, even if we may doubt the good policy of the extreme and sweeping language of this law, it has been enacted by the legislature, is the law of the state, and we can only determine whether the evidence justifies its application. In the main the purpose of the legislation seems to be wise and in the interests of the people generally. It may be that experience will show defects in its operation and results that proper amendment may remedy.

We are inclined to agree with the attorneys for the defendants that, unless the case falls within the language of the statute, no unlawful act has been committed, and the cases cited in their brief, considered aside from the statute, would be in point. But by section 1 of the Gondring act (Comp. St. 1907, ch. 91*a*, Ann. St. 1907, sec. 12000), it is declared to be a trust for two or more persons "to create or carry out restrictions in trade," or "to make or enter into, carry on or carry out any contract, obligation or agreement of any kind or description, * * * with intent to preclude, or the tendency of which is to prevent or preclude a free and unrestricted competition among themselves or others or the people generally in the production, sale, traffic or transportation of any such article of merchandise, product or commodity, or conducting a like business or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale, production or transportation of any such articles of merchandise, product or commodity or the carrying on of any such business, that its price might in any way be affected thereby." Under the provisions of the law, we are of the opinion that the acts of secretary Critchfield recited, as well as those related hereafter, were of such a nature as to stifle competition and to operate to restrain trade, and were unlawful, and that the officers and directors of the association were properly chargeable with knowledge of his acts, though they did not actively par-

ticipate therein, and that secretary Critchfield, the association and its officers should be restrained from a continuance of the unlawful practices heretofore indulged in. We find no warrant in the evidence, however, and no power in the law to justify the court at this time in dissolving the association or enjoining its proper and legitimate activities.

2. The second branch of the case is concerned with local combinations. The referee finds substantially that on and previous to the first day of May, 1904, the Barnett Lumber Company, a defendant, combined with a non-defendant for the purpose of regulating the prices of lumber and other building material and for the division of trade in the city of McCook and adjacent territory, and that by means of such combination they did control such prices. The referee also finds evidence tending to prove like combinations within the counties of Seward, York and Cass, but finds that the evidence fails to connect the defendant association with such combinations. The finding as to the Barnett Lumber Company seems to be supported by the evidence, and, though the Bullard company is not a defendant in the case, the charge in the petition covers conspiracy or combination with "persons unknown."

With regard to the finding as to Cass county; early in 1905 there were two lumber yards situated in Weeping Water, one owned by Charles Odwarker, the other by the firm of Whitten & Newcomb. Both names are printed in the 1905 list of members of the association as members at Weeping Water. It seems that between January and April there had been some friction between the two dealers, and upon the suggestion of Mr. J. C. Newcomb, one of the members of the firm of Whitten & Newcomb, who lived at Friend, Odwarker, who lived at Weeping Water, met Newcomb at the office of Bird Critchfield, the secretary of the Nebraska Lumber Dealers Association in Lincoln. Critchfield testifies they came to the office and said they had been selling lumber

for less than it cost them, and wanted to know if he could not help them about getting together. He testified that they asked him if he would not write out what is known as the "pound arrangement"; that Newcomb tried to tell him something about it, and that he said he could and would do so, while Odwarker testifies that Critchfield suggested in this conversation "that the fair way to divide the business was to divide on the weight, and if one man got any more than the other of course he would have to make it right with his competitor"; that Critchfield explained the manner of operation, and a few days afterwards sent him a memorandum of agreement. This memorandum, in substance, provides that the railroad weights of all material which each dealer receives on and after May 1, 1905, shall be the basis for settlement and division of trade; that each dealer shall pay into a common fund, which shall be equally divided, 24 cents a hundred pounds for all lumber, lath and shingles received during the previous month, 12 cents a hundred pounds on all lime, cement, etc., and $3 a hundred pounds on sash, doors, etc. Competitive bills that are figured at more than one yard shall be divided as nearly equal as possible, and it is agreed that each dealer will meet at the office of ..... on the first Monday night of each month and make full settlement of all business done the previous month. It is clear that such an agreement, if entered into, would be a plain violation of the statute. Odwarker says he was told by Critchfield in the conversation at Lincoln that the plan had been adopted by several dealers in different localities and that it was customary to divide the territory. After the receipt of the memorandum Odwarker withdrew from the association. No agreement was entered into between him and his competitor, and he has not been a member of the association since, so that in fact the attempted agreement and combination to divide profits was never consummated. There is evidence, however, to show that there was a local lumber dealers' organization in Cass county

which established prices and sent price lists to the different dealers in the county, and that Odwarker had been a member of a committee to fix prices. It appears that Critchfield went to Weeping Water and suggested to the manager of Odwarker's yard several plans and methods by which a division of profits could be made, particularly recommending the method of paying according to weight. It would seem, however, that his recommendations were never adopted, and that in that locality there has been fierce competition and a strenuous fight for business since. The conversation alluded to occurred in July or August, 1904, before the passage of the present law. By the attorney general this testimony is taken to mean that Odwarker was a member of a committee of the Nebraska Lumber Dealers Association upon fixing prices. We think it establishes that he had been a member of a committee of local lumber dealers in Cass county, and that such attempted price adjustment as was made was made between local dealers without the co-operation of the Nebraska Lumber Dealers Association or its officers or members as such, though its prices were transcribed into a blank price-book prepared and sold by Critchfield individually. We think, therefore, that the referee's finding as to Cass county is sustained by the evidence.

Documentary evidence was offered that a lumber dealer at Aurora, Nebraska, not a member of the association, and not a defendant in this case, suggested to the Rogers Lumber Company of York, Nebraska, that they had a bill left with them by a person who lived at or near York to be figured, and that if the York lumber dealer would send them a copy of the bill that they were figuring on, or if they could tell whether or not it was the same bill, they would then quote him a figure and would "try to protect" the Rogers Lumber Company's figures. Further documentary evidence was offered to show that in April, 1906, Moore & Hunsaker, lumber dealers at Stromsburg, Nebraska, inquired of the Rogers Lumber Company at York whether a man who formerly lived in York had left

a bill with them to be figured, and that they afterwards sent the Rogers Lumber Company a copy of the bill with the price quoted, and suggested the price which the Rogers company make to the customer. All these letters were found among the files of the Rogers Lumber Company, and were produced in answer to a subpœna *duces tecum*. Their introduction in evidence was objected to by the defendants for various reasons, principally for want of identification. The objections were sustained, and the documents excluded. Some of these letters were properly excluded; but, as to the two letters above referred to, we think the referee should have taken them into consideration. They were written upon the letter-head of the lumber dealer, were addressed to the Rogers Lumber Company, and were found in its letter-files. They bear upon their face certain indicia and marks of genuineness which we think entitled them to be considered. Under this testimony the acts of the parties writing the letters contravened the statute, and the state's exceptions to this portion of the fifth finding is sustained, and the injunction allowed as to them.

As to Seward county, the witness Bernicker testified that he had worked for the Rogers Lumber company at Seward up to July, 1906; that in the early part of that year some of the officers and representatives of the various lumber companies doing business in Seward county met at the Lindell hotel in Lincoln and agreed upon a scale of prices for that county, and that the prices were fixed at different meetings prior to July of that year; that after these meetings the practice was to figure bills high to customers of other yards. He further testified that the practice ceased in July, 1906. He does not testify that Mr. Critchfield or any officer of the Nebraska Lumber Dealers Association knew anything about these meetings. Two of the persons named by him as being present at the meetings testified that there had been a meeting at the Lincoln hotel in Lincoln, at which they were present; that they talked about the lumber business

generally and about prices, but that no price list was issued afterwards; that no limitations were made as to territory, and that nothing was said about maintaining prices. This suit was begun in April, 1906, so that if there was an agreement existing it was in operation at the time the action was begun. Several of the persons named as present at these meetings have not appeared to deny the statement of the witness Bernicker. No one speaks for Mr. Lewis, Mr. DeBolt, Mr. Erford, or Mr. Cocklan, who were each present at at least one meeting, according to the testimony of Bernicker. We think the preponderance of the evidence shows that meetings took place as related by Mr. Bernicker, and that the temporary injunction as to the defendants who were present or represented at the meetings should be made permanent. These are the Staplehurst Lumber Company, Erford, manager, P. D. Smith Lumber Company, A. E. Stratton, manager, Searle & Chapin Lumber Company and Rogers Lumber Company. The exception of the state, therefore, to the portion of the fifth finding with reference to Seward county is sustained.

As to Red Willow county, there is testimony as to a conference between one of the officers of a lumber company doing business at McCook and an officer of a company doing business at Arapahoe and Bartley, at which Critchfield was present, but we think the preponderance of the evidence does not establish the fact of an unlawful combination between these defendants, and the finding of the referee is sustained as to this. The attorney general argues that "each member of a conspiracy to restrict trade is answerable for all the acts and declarations of every other member in furtherance of a common design, and the evidence that the defendants fixed prices and divided territory is conclusive," citing *Farley v. Peebles*, 50 Neb. 723; *Chicago, R. I. & P. R. Co. v. Collins*, 56 Ill. 212; *Commonwealth v. Waterman*, 122 Mass. 43, and urges that these instances prove the larger combination. If the acts of the defendants in the several counties men-

tioned had been a part of a general plan, conspiracy or combination to fix prices or divide territory covering the whole state, then the principles he invokes would apply, but we do not think the evidence justifies such a conclusion. We think it shows that these instances were sporadic in their nature, and each local combination or attempted combination was no part of a general plan. Construing the facts disclosed by this testimony as to local combinations in the several counties, we are satisfied that the proof fails to establish that the Nebraska Lumber Dealers Association, as an association, attempted to fix prices or divide profit, or that it prescribed any price list or sale by which its members should regulate the cost to the consumer of the various articles in which they dealt, or that it prescribed territorial limits in which sales should be made by its members. Wherever such agreements have been shown to exist the defendants who participated in them are justly subject to the restraining power of the court to prevent their continuance of such unlawful practices, regardless of the fact whether they are members of the association or not.

We think the association is not to be held accountable for isolated acts or local agreements entered into between dealers, some of whom were members and some of whom were not members, any more than the organization of a church is to be held responsible for intolerant, oppressive or fraudulent acts indulged in by certain of its members, and, if the only evidence affecting the association were that produced upon this branch of the case, we would be compelled to sustain the conclusions of the referee.

In conclusion, we are satisfied that the conclusions of the referee are sound with respect to the lack of participation of the association in the fixing of prices or the restriction of territory within which sales might be made by local dealers. We think, however, that he has failed to give sufficient weight to the fact that the officers of the association were properly chargeable with knowledge of Critchfield's official acts as secretary, and, also, to the

facts which have been disclosed with reference to local combinations and agreements to restrict trade and for the dividing of territory. We think, also, that several defendants not named by him have been shown by the evidence to have joined or taken part in such combinations. We are of the opinion that the exceptions of the state to the findings of the referee which are inconsistent with these conclusions should be sustained, and that an injunction should be allowed perpetually enjoining and restraining Bird Critchfield as secretary of the Nebraska Lumber Dealers Association from carrying on the practices which are in this opinion declared to be unlawful, and as prayed in the sixth paragraph of the prayer in the petition, and enjoining and restraining the Nebraska Lumber Dealers Association, its directors, executive committee, and officers from permitting or allowing the said Critchfield or his successors as secretary of said association, or any of its officers to perform or do any act in its behalf or on behalf of its members, the tendency of which is to prevent and preclude free and full competition in the sale of lumber and building materials in the state f Nebraska, or to stifle competition or restrain commerce in such articles within this state.

It is insisted as to some of the defendants who are not members of the association that they are not subject to any of the results of this action, for the reason that at the times mentioned they were not members of the defendant association. This contention is based upon the idea that the sole purpose of this action is the dissolution of the association and the procuring of an injunction directed against it and its officers and members. We do not so understand the purpose of the suit. The action is brought against a large number of corporations, partnerships and individuals, charging them with combining with each other for the purpose of restraining trade and commerce in lumber and building materials and attempting to monopolize the same within the state, and for dividing the same in certain localities, and charging that

it was further understood by and between the defendants and members of the association that such members as had lumber yards in the same city or village should charge to the consumer the same price for lumber and building materials. We think these allegations are sufficient to justify the exercise of the restraining power of this court over such of the defendants as the evidence shows have participated in such unlawful practices, without reference to whether the whole body of defendants have been guilty of such practices or not, or whether the wrongdoers were or were not members of the Nebraska Lumber Dealers Association.

The defendants Moore & Hunsaker, Rogers Lumber Company, Searle & Chapin Lumber Company, P. D. Smith Company, Staplehurst Lumber Company and the Barnett Lumber Company, therefore, should be enjoined as prayed in the sixth paragraph of the prayer of the petition. As to the defendants Bowman-Kranz Lumber Company, George A. Hoagland, and Thomas Ostergard & Company, the findings of the referee are sustained.

JUDGMENT ACCORDINGLY.

MELVIN P. SMOTHERS V. STATE OF NEBRASKA.

FILED APRIL 23, 1908. No. 15,515.

1. **Incest:** EVIDENCE. At a trial upon a charge of incest, evidence may be properly received of other criminal acts of the same nature anterior to the time the crime is charged to have been committed.
2. ———: INSTRUCTIONS. An instruction, in substance, that the prosecutrix was not an accomplice, and that if the jury were satisfied beyond a reasonable doubt of the truth of her evidence it might convict the defendant, is a correct statement of the law applicable to the case.
3. ———: EVIDENCE. Under the facts testified to in this case, it was not erroneous to allow evidence that a child born after marriage was the result of incestuous intercourse.

ERROR to the district court for Boyd county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

W. T. Wills, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

LETTON, J.

Melvin P. Smothers was convicted of the crime of incest in the district court for Boyd county, and prosecuted error to this court. A number of errors are assigned in the admission of evidence, and in the giving and refusing of instructions, but the assignment upon which most stress is laid is that the evidence is not sufficient to sustain the conviction. It was charged in the information that the criminal act was committed upon the 18th day of March, 1906, and at divers times between that date and September 24, 1906. Evidence was admitted by the court tending to prove that certain acts of intercourse had occurred at an earlier period than the first mentioned date, and in the county of Keya Paha, and it is asserted that such evidence is inadmissible. It is uniformly held that upon a charge of adultery evidence of like acts occurring both anterior and subsequent to the time the crime is charged to have been committed may be received as corroborating proof. It was so held in an early case in this court (*State v. Way,* 5 Neb. 283) in a case of adultery; and in the case of *Woodruff v. State,* 72 Neb. 815, the doctrine of the *Way* case in this regard is extended to a case of carnal knowledge of a female child under the age of consent. In *State v. Markins,* 95 Ind. 464, 44 Am. Rep. 733, it is pointed out that such evidence is admissible in prosecutions for adultery, fornication, rape under the age of consent, and incest, and the reasons for the rule are clearly stated. See, also, *State v. Wood,* 33 Wash.

290; *State v. Fetterly,* 33 Wash. 599, 22 Cyc. 53. We are satisfied with the rule thus laid down, and no error was committed by the reception of this evidence.

It is further argued that there was gross error on the part of the trial court in permitting the prosecutrix to testify that the defendant was the father of her child; she being now a married woman, and the child being born after marriage. It appears from the evidence that after the witness had been pregnant about four months her hand was sought in marriage by a young man named Lynn, and that he requested her father's consent to the marriage, and that at that time the defendant told him that she was in a family way and that one Kline was the cause of her pregnancy. The evidence shows that Lynn married the prosecutrix immediately thereafter, and that the age of the child corroborated the statement of the girl that she had been pregnant about four months at the time of this interview. A like objection was made in *Woodruff v. State, supra,* to evidence of this kind, but in this connection it was said: "Evidence of this character is proper and admissible. It indisputably established one element necessary to be proved by the state; that is, that sexual intercourse had taken place. It was proof of the *corpus* of the crime, as it were; that is, that the prosecutrix had sustained unlawful relations with some one was by this evidence placed beyond the pale of doubt."

It is also objected that, since the child was born in wedlock, the law conclusively presumes that Lynn is the father of the child, and, hence, the evidence was incompetent and inadmissible. While it is true that, although the birth of a child during wedlock raises a presumption that such child is legitimate, yet it was well settled at common law that the issue may be proved illegitimate, although born during wedlock, by showing want of access, immaturity or imbecility of the husband, or any other cause which renders it impossible he should have been the father of the child; but want of access cannot be proved by the wife. *Gaffer v. Austin,* 8 Vt. 70; *Parker v.*

Nothomb, 65 Neb. 308; *Wright v. Hicks,* 12 Ga. 155; *Bruce v. Patterson,* 102 Ia. 184.

It is further earnestly insisted that there was no corroborative evidence, and that the defendant should not have been convicted upon the testimony of the complaining witness alone. It may be said, however, that as to a number of circumstances occurring about the several times at which the witness testified the criminal act took place she has been corroborated, though not as to the particular criminal act, and further evidence corroborative in its nature was introduced showing actions of the defendant about the time that public rumor was connecting him with the offense, and at other times, tending in some degree to indicate a guilty knowledge on his part. His statements as to Kline being the father of the child his daughter was pregnant with, taken with her testimony that he said they would charge Kline with the act, and the fact that Kline was apparently almost a stranger are also corroborative to some extent. It may be said that while there is no direct evidence except that of the prosecutrix, and while this testimony is positively denied by the defendant, there was sufficient testimony to warrant the jury, if they believed her story and disbelieved his, in finding the defendant guilty. There was no corroborative evidence as to the criminal act itself, but this was not necessary to a conviction. *Schwartz v. State,* 65 Neb. 197; *Bridges v. State,* 80 Neb. 91, 22 Cyc. 57.

Complaint is also made of the giving and refusing to give certain instructions. We have examined the instructions given and refused. What has been said as to the admissibility of the evidence covers in the main the points raised as to the instructions, and we see no reason for the criticisms made. Upon the whole, the case seems to have been fairly tried and the conviction to be warranted, if the jury believed the prosecutrix and disbelieved the defendant.

Lastly, it is said that the punishment imposed is excessive, and we are requested to reduce the sentence if

we find no reversible error in the record. The sentence imposed was imprisonment for fifteen years in the penitentiary. This is five years less than the maximum penalty for the offense charged. While the sentence was severe, the crime was heinous. Considering the length of the term and the age of the defendant, exemplary conduct on his part may make him a proper subject at some future time for the exercise of executive clemency by way of commutation of sentence, but we think that the penalty is not so disproportionate to the offense as to warrant our interference with the judgment of the district court.

The judgment of the district court is

AFFIRMED.

CHARLES L. BUEL ET AL., APPELLEES, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED APRIL 23, 1908. No. 15,373.

1. Appeal: QUESTIONS FOR JURY: VERDICT. In an action against a railroad company for damages to crops and live stock resulting from high water alleged to have been caused by the negligent construction of an embankment and changing the course of the flow of water in a stream on plaintiff's land, the two principal questions involved were as to the nature and extent of a rainstorm which caused the increase of the flow of water down the streams, whether the rainfall was of such magnitude as could not have reasonably been anticipated and therefore the injury should be attributed to the act of God, or whether the alleged damage was caused by the negligent construction of the embankment and damming of the stream. The evidence upon both propositions was somewhat conflicting. They were submitted to the trial jury under proper instructions. *Held*, That the questions were for the jury to decide, and on review the verdict thereon was final.

2. Waters: RAILROADS: EMBANKMENTS: BURDEN OF PROOF. In such a case, the defendant requested the court to instruct the trial jury that, where the answer of the defendant contained a denial of negligence in the construction of the embankment and damming the stream and changing the watercourse, the burden of proof was

"upon the plaintiff to show by a preponderance of the evidence that the rainfall was not unprecedented and so unusual as not to have been reasonably contemplated at the time of the construction of the embankment." The court refused to give the instruction. *Held*, No error; the burden being upon the defendant to maintain the defense.

3. Trial: INSTRUCTIONS. The railroad of defendant was constructed across plaintiffs' farm in 1892, 1893. There were two streams upon the land, which were crossed by the railroad; suitable pile bridges being placed across each stream. The distance between the streams was about one-fourth of a mile. In 1898 both bridges were removed, one of the streams filled up so as to effectually dam the water, and a new channel was cut along the upper side of the railroad track, changing the flow of water into the other stream above the railroad, and a new bridge, much smaller in capacity than either of the former ones, was constructed across the stream carrying the combined flow of both. No complaint was made by plaintiffs as to the construction or capacity of the former bridges. In 1902, during or after a heavy rainfall, the opening at the new bridge was of insufficient capacity to permit the water to pass, and the land above the embankment was overflowed and the crops and property of plaintiffs were destroyed. The action was founded upon the alleged negligence of the defendant in closing the one stream, the increased height of the embankment, and the failure to provide a sufficient outlet for the accumulated water. The defendant requested the court to submit to the jury the question as to whether the changes made in the embankment in 1898 were skilfully and carefully or negligently and carelessly made. The court properly refused to so instruct, as there was no issue of that kind before the jury upon which the court had not given suitable instructions.

4. Appeal: SPECIAL FINDINGS: DISCRETION OF COURT. "The submission of questions to the jury for special findings is a matter within the discretion of the trial court, and the submission or refusal to submit such questions will not be reviewed except for abuse of discretion." *Reed v. McRill*, 41 Neb. 206.

5. Damages. The evidence showed a loss to the plaintiffs of 35 acres of oats of the value of $240, 15 acres of wheat in the shock of the value of $120, 85 acres of corn of the value of $680, besides meadow land and some live stock. *Held*, That a verdict finding damages, including interest, to be $663.33 was not excessive.

6. ———: INTEREST. "Where property is destroyed by the negligence of another, the owner will be entitled to interest on the value of such property from the time of its destruction." *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

M. A. Low, Billingsley & Greene, P. E. Walker, P. F. Greene and *E. P. Holmes,* for appellant.

Charles O. Whedon, contra.

REESE, J.

This is the second time this cause has appeared in this court. The case upon the former hearing is reported in 76 Neb. 420. The action is for damages alleged to have resulted to the growing crops of plaintiffs, caused by the damming up and changing of a watercourse on the land of plaintiffs by an embankment created for defendant's railroad track. Two streams, referred to as the North and South Forks of Salt creek, pass through plaintiff's land, forming a junction below or after passing beyond plaintiff's boundary line. At a point where it is claimed the cause of damage to plaintiffs was located the distance between the two streams was approximately a quarter of a mile. In 1893 the defendant constructed its railroad across plaintiffs' land, crossing the streams at the points designated, constructing a pile bridge across the north fork some 200 or more feet in length, thus, as is claimed, allowing ample room for the passage and flow of the stream under the bridge. A similar bridge was constructed across the south fork about 150 feet in length, thus providing ample space for the flow beneath the bridge of the south fork. In 1898 the bridge across the north fork was taken out, the creek bed filled, and a new channel cut along the west or upper side of the railroad track, diverting the water from the north to the south stream, causing it to empty into the south stream just above the bridge. The 150-foot pile bridge was taken out, and a steel bridge about 90 feet long, resting upon concrete abutments, substituted in its stead. The em-

bankment extending from one stream to the other was some 20 or 25 feet in height, leaving no other escape of the water for both streams than under the steel bridge above referred to. The land just above the embankment and bridge was farm land owned by plaintiff Buel and leased to plaintiff Willi, the rent to be paid by a division of the crops and of the income from raising live stock. It is alleged by plaintiffs that in the month of July, 1902, the water of these two streams was, by reason of the inadequate opening in defendant's railroad grade, dammed and backed up over and upon plaintiffs' farm, destroying the growing crops and some of their live stock thereon. The petition contains the usual averments required in such cases. The answer admits the construction of the railroad bed and grade substantially as above set forth; denies all negligence in the construction of the grade and changing the channel of the north stream, or that plaintiffs' loss, if any, was in any way attributable to any act of the defendant; and alleges that the rise of the water in the creeks and the flooding of plaintiffs' land, if so flooded, was caused by an unprecedented storm and rainfall which could not have been anticipated nor guarded against, and was due to the act of God, and no want of care on the part of defendant. The statute of limitations is pleaded, and a general denial is set up. The reply consists of a general denial. The trial resulted in a verdict and judgment in favor of plaintiffs, and from the judgment defendant has appealed.

There seems to be no question but that defendant's railroad was constructed as above stated and as claimed by plaintiffs. It may also be said that the flood of water coming down the two streams was unusually great, and that the property of plaintiffs was destroyed to at least the extent of the amount named in the verdict and judgment. The principal questions submitted to the jury were as to the nature and extent of the storm and flood, that is, whether they should be classed as what is known in

law as the act of God and for which defendant could not be held liable, and whether the changing of the course and flow of the north stream and the closing of the old channel should be classed as a negligent act; in other words, whether the provision made for the escape and flow of the water through the one channel and under the one bridge, of smaller capacity than either one of the two as originally constructed, was such a provision for the escape of the water as would protect the property of plaintiffs from damage from such floods and high water as might have been reasonably expected, judging by the topography of the country and the past history of the streams. These questions were submitted to the jury upon more or less conflicting testimony, and were for its determination. It could serve no good purpose to set out the evidence upon the two propositions, for it is thought this statement will be conceded to be correct.

Upon the trial the court upon its own motion gave 15 instructions to the jury. The defendant requested the giving of 13 others, all of which the court refused to give. All instructions given were excepted to by defendant, as well as the refusal to give those requested. As the substance of the instructions refused was largely contained in the instructions given by the court we will not notice them further. The instructions given by the court are in the main such as have heretofore had the approval of this court, and will not be here discussed, except where specially assailed. It was contended at the trial, and is stated in defendant's brief, that "the burden of proof is not upon the railway company to show that the injury was due to the act of God, but upon the plaintiffs to prove that the loss was not occasioned by Providence," and the case of the *City of McCook v. McAdams*, 76 Neb. 7, is cited in support thereof. Since the preparation of defendant's brief in this cause, a rehearing was had in that case, and it was held that, where the act of God was presented as a defense in a case of negligence, the burden of proof was on the defendant to establish

such defense. See *City of McCook v. McAdams*, 76 Neb. 11. We may assume that this question is now settled against the contention of defendant.

Instruction numbered 3, requested by defendant and refused by the court, is to the effect that it was not claimed by plaintiffs that the defendant was guilty of negligence in the original construction of its road in 1892, 1893, and that it was for the jury "to determine whether the changes made with reference to the embankment in 1898 were skilfully and carefully or negligently and carelessly made." There is no record made by the court as to whether this instruction was given or refused, nor whether there was any exception to any action of the court thereon. But, as there was a list of exceptions filed in which it is said, "the defendant excepts to the refusal to give instruction numbered 3 requested," we will assume that the instruction was not given, and that due exception was taken. We are unable to see that any prejudice could result to defendant by the failure to give the instruction. We have been unable to discover anywhere in the record any claim by plaintiffs that the original construction of defendant's railroad was in any way negligent or wrongful. It is alleged in the petition that prior to the commission of the wrongs complained of the defendant constructed its line of railroad across plaintiffs' farm and has since operated said line of road; that some time prior to the year 1902 the defendant constructed an embankment across said stream and entirely filled up said stream, and left no opportunity for the water to pass along its former and natural course underneath the roadbed of the defendant's railroad, but completely dammed said stream at the point where the same is intersected by the said line of road. There was no claim during the trial that any injury was caused by the original construction of the railroad. There was no issue of that kind before the jury upon which the court had not given suitable instructions.

After the introduction of the evidence, and before the

jury retired to consider their verdict, counsel for defendant requested the court to submit to the jury the following interrogatories or special findings: "(1) Was the railway of defendant constructed across the east half of section 32, township 8 north, range 6, in Lancaster county, Nebraska, constructed in a proper and careful manner? (2) Was the injury, if any, suffered by the plaintiffs due in any manner to the construction of the railroad of the defendant across the east half of section 32, township 8 north, range 6, in Lancaster county, Nebraska? (3) Were the embankments and bridges of the defendant on the east half of section 32, township 8 north, range 6, in Lancaster county, Nebraska, properly and carefully constructed? (4) Was the injury, if any, suffered by the plaintiffs due to the construction of the embankments and bridges of the defendant?" These requests were refused, and the action of the court in that behalf is assigned for error. It is the well-settled law of this state that the matter of submitting special findings to a trial jury rests in the sound discretion of the court. *Floaten v. Ferrell*, 24 Neb. 347; *Hedrick v. Strauss*, 42 Neb. 485, and many other cases which need not be here cited. In the absence of a clear abuse of discretion by the court in the refusing such requests its action will not be reviewed. In this action of the court we are unable to discover any prejudice resulting to defendant. The issues submitted to the jury were few and simple. The answering of the questions either way by the jury would have furnished no aid to the court or the parties to the suit. The mere finding of the general verdict would necessarily be an answer to each one of the questions.

It is contended that the damages allowed by the jury were excessive; the amount being $663.33, including interest. The evidence showed the loss of 35 acres of oats of the value of $8 to $10 an acre; 15 acres of wheat in the shock of the same value an acre; 85 acres of corn of about the same value, besides meadow land and live stock.

Had the verdict been for twice the amount returned, it could not have been held excessive.

The court instructed the jury that in case their finding was in favor of plaintiffs they should ascertain from the evidence the value of the property damaged or destroyed, and the same with interest at 7 per cent. per annum from the 10th day of July, 1902, would be the amount of their verdict. Complaint is made of this instruction on the ground that plaintiffs were not entitled to interest. This question has been before this court in *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138; *Union P. R. Co. v. Ray*, 46 Neb. 750; *Missouri, Kansas & Texas Trust Co. v. Clark*, 60 Neb. 406. The law is settled in this state that interest in such cases will be allowed.

We are unable to detect any error in the record calling for a reversal of the judgment of the district court. It will therefore be, and is,

AFFIRMED.

CHARLES ODELL, APPELLEE, V. JAMES C. STORY, APPELLANT.*

FILED APRIL 23, 1908. No. 15,134.

1. **Vendor and Purchaser: BOUNDARIES: REPRESENTATIONS.** While the owner of real estate is presumed to know the boundaries thereof, and a purchaser who has no knowledge of such boundaries may rely on the representations of the owner relating thereto when positively made, he is not authorized to rely upon an opinion of the owner or his statement of the distance from a known to an unknown corner, but must in such case investigate and ascertain for himself the true boundary.

2. ———: **FRAUD: DAMAGES.** When the owner of land has pointed out to his vendee land which he did not own as land which he proposed to sell and convey, and has conveyed to him land of less value than that pointed out and which the vendee supposed he was buying, the vendee may recover the difference in value

* Rehearing allowed. See opinion, p. 442, *post*.

between the land shown him as the subject of his purchase and the land actually conveyed.

3. Evidence. The understanding of a witness derived from language used by a party is not competent evidence for a jury. The language used should be detailed, and the inference deducible therefrom is for the jury to determine.

4. ———: OPINIONS OF WITNESS. In a suit brought to recover damages for fraud and deceit in a sale of land, the opinion of a witness as to the amount of damage sustained by the plaintiff is not competent evidence, that being a question for the jury.

APPEAL from the district court for Hitchcock county: ROBERT C. ORR, JUDGE. *Reversed.*

W. S. Morlan and *Boyle & Eldred,* for appellant.

Perry & Lambe, contra.

DUFFIE, C.

In January, 1906, the plaintiff purchased from the defendant 320 acres of land in Hitchcock county, Nebraska. The land purchased is the southwest quarter of section 31, the west half and the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section 31, in township 4, of range 34 west of the sixth P. M. It will be noticed that the south boundary line of the land purchased is one-half mile in length. The plaintiff in his petition alleges that the defendant pointed out and represented to him that the southeast corner of the southwest quarter of section 31 was 80 rods east of its true location, and that the land he was selling him included a tract of level farming land lying east of the land actually sold and conveyed; that he represented the land to contain 200 acres of good level land with deep soil well adapted to corn and wheat raising; that he was a stranger to that part of the country, had no knowledge of the land he was purchasing, and, relying upon the defendant's representation, paid $3,100 for said land; that the land sold and conveyed to him did not contain to

exceed 60 or 70 acres of level farming land, and was worth $2,500 less than the land pointed out, and which he supposed he was buying. The defense was a denial of any false representations relating to the boundary of the land, and, further, that plaintiff before making his purchase examined and investigated the location, boundary and character of the land and character of the soil, and that means of knowledge of all matters were open to the plaintiff and equally available to both parties. The jury awarded the plaintiff $1,600 damages, and from a judgment entered upon the verdict the defendant has appealed.

The testimony of the plaintiff and of several witnesses who testified in his behalf tended strongly to establish the allegations of the petition, but the defendant testified, in substance, that he showed the plaintiff a fence on the west boundary line of section 31, as well as the south line of said section, and told him and those with him that the southeast corner of the southwest quarter was one-half mile east from the fence on the west line, and denied locating the southeast corner or pointing it out. The law in this state seems to be well settled that a purchaser of real estate has a right to rely upon representations made by his vendor relating to the location of his property, when the facts concerning which such representations are made are unknown to the vendee. *Hoock v. Bowman,* 42 Neb. 80. In that case, *Roberts v. French,* 153 Mass. 60, was referred to with approval. In *Roberts v. French,* a lot was sold at auction. It was inclosed by a fence. The auctioneer announced that he had measured the lot, and that its dimensions were as stated in the advertisement, except as to the easterly line, which was 107 feet long, and that the lot contained about 11,000 square feet. The plaintiff was familiar with the premises, and he understood that he was buying only the land inclosed by the fence, but according to his evidence he believed the statements of the auctioneer as to the length of the line and the area, and made his bid relying upon

them. It was afterwards ascertained that the easterly line was in fact only 95½ feet long, and that the contents of the lot was 7,760 feet instead of 11,000 feet. The action was to recover the purchase price. In the opinion it is said:

"Notwithstanding the plaintiff's knowledge how the land looked, the jury also might have found that the statement in fact deceived him, and induced him to buy, and that it materially varied from the truth. It is true that the agreement was to buy a lot with known boundaries, and very likely, in the absence of fraud, the rule would apply that monuments govern distances in such agreements and in deeds with warranty. * * * But that is only a rule of construction; it does not mean that measurements are not material, or that a man who knows the monuments cannot be deceived about them. * * * When a man conveys 'the notion of actual measurement,' * * * still more when he says that he has measured a line himself and has found it so long, his statement has a stronger tendency to induce the buyer to refrain from further inquiry * * * than a statement of the contents of a lot without giving grounds for the estimate. If false, it is a grosser falsehood. It purports on its face to exclude the suggestion that it is a mere estimate which the other leaves open."

It will be presumed that the owner of land knows the boundaries thereof, and, in the absence of something to put him on inquiry, a purchaser from the owner is entitled to rely upon positive statements made by the owner as of his own knowledge concerning the boundary. If, however, he does not pretend to point out the boundary, but merely gives his opinion or states the distance from a known to an unknown corner, the purchaser is not at liberty to rest upon such representations as matters of fact, but must ascertain for himself the true boundary line. In this view of the law, instruction numbered 3, asked by the defendant and refused by the court, should have been given the jury. The instruction is as follows:

"In order for the plaintiff to recover on account of any false representations of the defendant in this action, it must appear by a preponderance of the evidence that the representations upon which the plaintiff claims to have relied were made by the defendant with reference to the location or boundary of the land involved as a positive statement of existing facts, and not as a mere expression of opinion by the plaintiff; hence, if you believe that any statements made by the defendant as to the location of said land or boundary thereof were made as merely an expression of opinion, and not as a positive statement of existing facts, the plaintiff cannot recover in this action, and your verdict should be for the defendant."

Exceptions were taken to the instructions given relating to the issues made by the pleadings, and to the measure of damages. We think the instructions given by the court on its own motion fairly stated the issues made, and that they are lacking only in furnishing the jury with the measure of damages in actions of this character. One or more of the instructions given on the request of the plaintiff relate to the measure of damages, but it would have been better had the court on its own motion told the jury that the plaintiff, if entitled to recover, should be allowed the difference in value between the land pointed out to him as the land which the defendant was offering to sell and the land which the defendant afterwards conveyed to him. The great trouble with the instructions, as we view it, is their multiplicity. As said in *City of Beatrice v. Leary*, 45 Neb. 149: "Instructions in a case should be few in number, and should present to the jury the law applicable to the issues in the case in simple language and terse sentences. Numerous instructions, or instructions with long and involved sentences, are more likely to confuse the jury and lead it astray than to enlighten it and direct it to the material points of the case."

Exceptions were also taken to the evidence admitted by the court. The following question propounded to one

of plaintiff's witnesses will illustrate the character of the evidence to which the defendant took exceptions. "What did you understand was the east line of this land as represented to you by defendant Story on the 8th day of January of this year?" The question and answer were objectionable and prejudicial. The understanding of the witness obtained from the language used by the defendant was not the question in issue, and was immaterial. He should detail what the defendant said concerning the boundary line, and leave it to the jury to say what impression or understanding the plaintiff was justified in coming to from the language used. It was for the jury and not for the witness to say what inference the language used justified. The plaintiff himself was asked what damage he sustained in consequence of the false representations made by the defendant, and he answered that his damage was $2,500. This, of course, was the very question which the jury was to determine from facts placed before them by the evidence. The court should not allow the witness to usurp the functions of the jury. The opinion of the witness relating to the damages sustained was not competent evidence for their consideration.

We recommend a reversal of the judgment and remanding the cause for another trial.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for another trial.

REVERSED.

The following opinion on rehearing was filed December 17, 1908. *Former judgment of reversal adhered to:*

1. Appeal: REFUSAL OF INSTRUCTION. To refuse an instruction that is not applicable to the evidence does not constitute error.
2. ———: JUDGMENT: EVIDENCE. A judgment will be reversed for the reception of improper evidence where it is probable that such improper evidence influenced the verdict of the jury.

CALKINS, C.

The issues involved in this case are set forth in the former opinion by DUFFIE, C., *ante,* p. 437, which contains a sufficient statement of the facts.

1. In the former opinion it was said that instruction No. 3, quoted therein, should have been given to the jury. Upon consideration we are satisfied that the court did not err in refusing to give this instruction. As stated in the former opinion, the testimony of the plaintiff and several witnesses who testified in his behalf tended strongly to establish the allegations of the petition, while the defendant, denying these allegations, testified that he showed the plaintiff a fence on the west boundary line of section 31, and told him that the southeastern corner of the southwest quarter was one-half mile east from the fence on the west line. Further than this he does not appear to have given any opinion concerning the location of the southeast corner. The instruction referred to was not therefore applicable to the evidence, and, further, it might be construed as directing the jury to find for defendant if any statement made by defendant concerning either the boundaries of the land or the land itself was an opinion.

2. The plaintiff, in his argument, does not attempt to justify the admission of evidence, examples of which are given in the former opinion, but argues that the verdict was the only one which could have been returned under the evidence, and that therefore such errors should be disregarded. We have carefully read the evidence, and we are satisfied that the testimony would have justified a verdict for the defendant. The defendant's testimony is direct and to the point, and, if true, it fully establishes his defense. It was opposed by the testimony of other witnesses; but the question of the veracity of the witnesses was one for the jury, and there was evidence sufficient to support a verdict for either party.

The plaintiff called as a witness one Wilson, who ap-

peared to have been present at the time the plaintiff pointed out the boundaries of the land. After questioning him concerning what was said and done, the plaintiff propounded the following question: "From the representations made by Mr. Story and what he stated with reference to the east boundary line, would you or would you not be led to believe that the west half of the southeast quarter and the northeast quarter of the southeast quarter were a part of the land that he was trying to sell the plaintiff Odell?" This question was objected to on the ground that it was incompetent, irrelevant, and called for a conclusion of the witness; but the objection was overruled, and the witness answered, "Yes, sir." It is hardly necessary to say that this was a violation of the general rule that the fact that any person is of opinion that a fact in issue or relevant to the issue does or does not exist is not regarded as relevant, and it cannot be contended that this question falls within the well-known exceptions to such rule. We are not able to say that such evidence might not or probably did not influence the judgment of the jury. We think the plaintiff's argument upon this question is inconsistent. He asks us to say that the evidence could only justify a verdict for the plaintiff, and, to convince us of that, he, in his brief, quotes the above question and answer. If the faith of the learned counsel in his having made his case is based upon such evidence as this, we may well believe that it influenced the jury in arriving at their decision.

We are satisfied that a verdict resting upon such testimony should not be allowed to stand, and we recommend that the former decision of this court be adhered to.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is adhered to.

JUDGMENT ACCORDINGLY.

ETHEL CLARK, APPELLANT, V. JACOB FLEISCHMANN ET AL., APPELLEES.

FILED APRIL 23, 1908. No. 15,144.

1. **Testamentary Trusts:** TITLE TO REAL ESTATE. Where by the terms of a will the executor and trustee is invested with the management and direction of the real property of the testator, and is required to devote sufficient of the rents and profits to the support of his widow and daughter during their life, and to furnish aid to his father and mother, if their financial condition requires it, retaining any surplus not required for such purposes until sufficient is accumulated to discharge a mortgage on the home of the widow, the legal title to such real estate vests in the executor and trustee until the trust created by the will is discharged.

2. ———: DEVISE: REVERSION. By the terms of a will the income from the real estate of the testator was devoted to certain uses under the direction of the executor and trustee named in the will. After the death of the parties entitled to the income the real estate was devised to an academy, provided the academy had on hand an endowment fund of a certain amount by the year 1900; otherwise the testator's estate was to revert to his heirs and be distributed among them in the proportions provided by the statutes of this state at the time the will was made. The academy having failed to accumulate the endowment fund required by the will at the date fixed therein, *held*, that the title to the real estate then vested in the heirs at law of the testator.

3. ———: POWER OF SALE. While the legal title to real estate of a decedent may, by the terms of his will, vest in the executor and trustee for the purpose of a trust created by the will, the trustee cannot sell such real estate unless an express power of sale is given by the will, or unless the duties imposed upon the trustee by the terms of the will make it necessary that a sale should be made by him in order to carry out the testator's intentions, in which case an implied power of sale will arise.

4. **Partnership:** DEATH OF PARTNER: ADMINISTRATION OF ASSETS. On the death of a partner the partnership assets, both real and personal, pass to the surviving partner, and he is entitled to possession thereof, as against the heirs and executor of the deceased, until the partnership debts, for which he alone is liable, are paid.

5. **Descent and Distribution:** RIGHT OF POSSESSION OF REAL ESTATE. While the executor or administrator of an estate is ordinarily entitled to possession of the real estate of the decedent and to

apply the rents and profits to the discharge of debts owing by the estate, the heir to whom the title descends may maintain ejectment against a stranger in possession during the process of administration, or against a grantee of the executor when the executor has no power to sell and convey the estate.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Reversed.*

Byron Clark, for appellant.

A. N. Sullivan and *William Deles Dernier, contra.*

DUFFIE, C.

The plaintiff, Ethel Clark, only heir at law of John W. Clark, deceased, brought this action to recover from defendants the possession of the west half of the northeast quarter of section 16, township 10 north, of range 10, in Cass county, Nebraska, excepting the northeast fourth of the northwest fourth of the northeast quarter thereof, and also to recover the rents and profits of said land for four years prior to the commencement of the action. After the parties had introduced their testimony, the court directed a verdict for the defendant and entered judgment dismissing the plaintiff's action at her costs. Plaintiff has appealed.

The record shows that John W. Clark, father of the plaintiff, executed his last will and testament December 24, 1888; that said will was admitted to probate March 15, 1889. Thomas K. Clark, a brother of the deceased, was nominated in the will as sole executor and trustee to serve without bonds. In February, 1889, a petition was presented to the probate court of Cass county, in which it was alleged that John W. Clark died on the 15th of February, 1889; that he left a personal estate to be administered of the value of about $3,000, and real estate, the annual rents and profits of which did not exceed $500; that it was necessary that a special administrator be appointed to collect and preserve the property, for

the reason that most of the personal property was in notes and mortgages which were held in company with other parties, and which were coming due and needed immediate attention. The probate court, on February 20, 1889, appointed Thomas K. Clark special administrator, and on March 15, 1889, Thomas K. Clark was appointed executor of the estate of the deceased, and he at that time duly qualified. April 5, 1889, the probate court appointed appraisers of the estate, and on the 20th day of April, 1889, the appraisers made a report showing the decedent's interest in the land in controversy in this action to be a one-half interest, and appraising such interest at the sum of $1,300. February 28, 1890, Thomas K. Clark, as executor and trustee of the estate of John W. Clark, conveyed the land in controversy to Jacob Fleischmann, the consideration recited in the deed being $2,535, and Fleischmann has since that date had possession of the land and lived thereon with his family.

It now becomes necessary to examine the will of John W. Clark, under which both parties claim title to the premises. The will, after providing for the payment of the testator's debts and funeral expenses, bequeathed certain personal property to his brother, Thomas K., and his wife, Anna. Articles five, six, seven, nine and fourteen of the will are as follows:

"Fifth. I give, devise and bequeath to my beloved wife, Anna E. Clark, and my beloved daughter, Ethel Clark, the income derived from the rental of my real estate and the income from the investment of the proceeds thereof, together with the profits and proceeds of sale of my personal property, my said wife and daughter to receive, share and share alike, and in the event of the death of either, the survivor to receive the whole of such income during her natural life or the natural life of either of them, this provision subject to the exceptions herein stated, to wit: First, my wife and daughter are only to receive sufficient for their support and maintenance and education until the surplus of the income herein bequeathed is

sufficient to pay off and satisfy a mortgage now on my wife's house in Weeping Water, which mortgage I desire my executor to pay off and discharge from the income herein referred to and bequeathed. Second, if my beloved father, Timothy Clark, and my beloved mother, Anna Clark, should need any assistance of a pecuniary character during their natural lives, it is my desire that my said parents receive one-half of my said income and my executor hereinafter named is made the sole judge of determining as to the division of said income as herein bequeathed.

"Sixth. I give, devise and bequeath to my beloved brothers, Thos. K. Clark and Timothy B. Clark, share and share alike, the income bequeathed to my wife and daughter, if my said brothers should survive them. My intention being to give to my said brothers the said income bequeathed to my wife and daughter after their death should my said brothers survive them.

"Seventh. After the decease of my wife, Anna E. Clark, and daughter, Ethel Clark, and father, Timothy Clark, and mother, Anna Clark, and brothers, Thomas K. Clark and Timothy B. Clark, I give, devise and bequeath unto the Weeping Water Academy of Weeping Water, Nebraska, all of my estate, both real and personal, after the uses hereinbefore set forth have been performed, to have and to hold in trust for the purpose and in the manner following, viz.: First. All of said estate to be invested in loans to be secured by a first mortgage deed upon real estate, and the said loans shall in no case exceed forty per cent. of the fair, cash, market value of said security for each separate loan. Second. The said academy to have the sole and separate use of one-half of the income of said estate less all actual and incidental expenses necessary in taking care of said estate, said use to be in full, final and complete release for all services rendered said estate by said academy and its proper officers. Third. Believing that a good and thorough education is most beneficial and conducive to good morals

and religion, and being desirous that all of my descendants shall have the opportunity of a good and thorough education, I hereby create and establish a permanent fund out of my estate so held in trust by the Weeping Water Academy which shall always be known by the name of the 'Clark Heir Educational Fund,' and one-half of the gross income derived from said estate shall be expended upon application in the payment of all expenses in the maintenance and education of my descendants in any college, university, public or private school they may elect to attend, said application to be allowed and paid in the following order: First, to my lineal descendants, and, second, to my collateral descendants in equal degrees of affinity, and if at any time said income shall not be sufficient to pay all applications made for education, I direct that those of my heirs who are least able to pay the expenses of their own education by themselves and parents shall be paid first."

"Ninth. I further direct my executor and trustee hereinafter named to distribute under and by virtue of the law of this state to the persons herein designated all of my said estate, provided that the Weeping Water Academy of Weeping Water, Nebraska, shall not at or before the year nineteen hundred have builded and in actual use by said academy a college building costing not less than ten thousand dollars ($10,000) exclusive of furnishings and an endowment fund of not less than twenty thousand dollars ($20,000) dedicated to educational purposes derived from private individuals and exclusive of any actual or expectant interest in my estate under the provisions of this will, and the absence of either the building or the endowment fund as above required at the time named shall cause my entire estate to revert to my legal heirs under the present laws of descent of the state of Nebraska."

"Fourteenth. I hereby nominate and appoint my beloved brother, Thos. K. Clark, my sole executor and trus-

tee of my estate under this my last will and testament to serve without bonds which are now required by the law from executors and administrators or of any form."

In construing a will, it is the purpose of the court to ascertain the real intention of the testator. It is quite evident from the fifth article of the will that the testator intended to give to his wife and daughter such part of the income arising from his real estate as would be sufficient for their support and the education of the daughter, the surplus to be held by the executor and trustee until sufficient had accumulated to pay a mortgage existing on the home of his wife in Weeping Water, the discretion of the trustee to be exercised in extending aid from such income to the father and mother of the testator, if their circumstances required it. As the wife and daughter were to receive only sufficient of the income for their support and education, it is evident that some one must be invested with power to determine the amount of the income which should be used for that purpose, and of necessity this person, in the absence of further direction in the will, was the executor and trustee of the estate having the same in charge and whom the testator evidently contemplated, by the language used, should attend to renting the real estate and to disbursing the rents received therefrom. Under the seventh article of the will, all of the real estate of which the testator died seized, and all the personal property belonging to the estate on the death of the wife and daughter, and of the parents and brothers of the testator, was to pass to the Weeping Water Academy, in case that institution had erected a building costing not less than $10,000, and had acquired an endowment fund of not less than $20,000, on or prior to the year 1900, and of necessity the title to the real estate must rest in some one after the death of the testator, and prior to its being vested in the Weeping Water Academy, in case that institution had complied with the conditions of the will. That many years would reasonably be expected to elapse before the death of all

the relatives of the testator mentioned in the will must have been contemplated by him, and during that time some one must be invested with title to the real estate, as it is a rule of the common law that title to land cannot be in abeyance or without an owner, even for a single moment. *Sands v. Lynham,* 27 Grat. (Va.) 291, 21 Am. Rep. 348.

Who then was to hold the title during this period? It is a general rule that a trust will be implied in the executor of a will when the duties imposed are active and render the possession of the legal estate in the executor convenient and reasonably necessary, although it may not be absolutely essential to accomplish the purposes of the will, and when such implication would not defeat, but would sustain, the disposition of the will. *Roberts v. Corning,* 89 N. Y. 225. In *Bradley v. Amidon,* 10 Paige Ch. (N. Y.) 235, Chancellor Walworth said: "By the express terms of this will, the executors are to take upon themselves the management and direction of the property until the children of the testator's daughter shall respectively attain the age of twenty-one, and from the rents and profits to provide for her support, as well as for the maintenance and education of her children who have not attained that age. This is a valid trust under the provisions of the revised statutes, and the legal title must vest in the trustees by implication, during the minorities of the legatees and devisees respectively, to enable such trustees to collect and receive the rents and profits and income of the property, and to apply them to the purposes of the trust in the meantime, and to accumulate the surplus, if any, for the benefit of those who are entitled thereto, during their respective minorities, as directed by the will." In *Bowen v. Payton,* 14 R. I. 259, the court held that a devise of the rents and profits of the testator's land to his sister for life, to be paid by his executor, is not a devise of the land to her, but to his executor in trust to receive the rents and profits for her use during life. To us it seems plain that it was the in-

tention of the testator that the title should be held by his executor and trustee not only from the circumstances here mentioned, but, from another provision of the will which will be noticed hereafter, this seems to be the only conclusion to be derived from all the circumstances and the wording of the will.

It is conceded that the Weeping Water Academy did not in 1900 possess the endowment fund required by the terms of the will to entitle it to the testator's estate. That being the case, according to the ninth article of the will the executor and trustee was to distribute the estate to the parties entitled thereto under the statutes of Nebraska. Was the executor and trustee empowered to sell the land? The will does not confer upon the executor and trustee any express power to sell the real estate, and no power to sell will be implied unless the duties imposed by the will make it necessary that a sale should be made by the executor in order to carry out the testator's intention. *Gammon v. Gammon Theological Seminary,* 153 Ill. 41; *Wilson v. Mason,* 158 Ill. 304; *Hale v. Hale,* 125 Ill. 399. It is conceded that the Weeping Water Academy did not have an endowment fund sufficient to entitle it to take under the will. This being the case, the whole estate, under the ninth article of the will, reverts to the testator's legal heirs and is to be distributed among them as provided by the statutes of Nebraska. The executor is directed to distribute the estate, and the defendants insist that by the use of this language the testator intended that the executor and trustee should sell the real estate and distribute the proceeds among his heirs. As before stated, a power of sale, when not expressly given, will not be lightly implied. While the word "distribute" is usually applied to money and personal property, it has also been held to designate a division of real estate among heirs or devisees. A will giving the executor and trustee express power of sale contained also the following provision: "Second. When my said daughters, Ida M. and Florence, or the survivor of them,

shall have attained to the age of twenty-one years, or in case of the death of both of them under twenty-one years of age, then upon the decease of the longest liver of them, whichever event shall first happen, I direct the said trustee to distribute the trust estate in the following manner." "The will, exclusive of the power of sale, did not authorize the trustee to sell the land, but the power did authorize such sale in the trustee's discretion. If the power of sale were not exercised, who would take the real property? The persons described as distributees would take it, and it is considered that they would take it as remaindermen, by a title that vested in them at the death of the testator. There was a life estate carved out of the property. The trustee took an estate commensurate with the life estate, inasmuch as the declared purpose of the trust required that no greater estate be vested in him." *In re L'Hommedieu,* 138 Fed. 606. In the case we are considering, had the Weeping Water Academy met with the conditions of the will to entitle it to the estate, the executor and trustee would have held a life estate during the life of the testator's relatives mentioned in his will; but, when it was found in 1900 that the devise to the academy failed, the whole estate reverted and passed to the testator's legal heirs.

The testator, John W. Clark, and Thomas M. Howard were partners in the law, loan and real estate business at Weeping Water, Nebraska, and had been for some years prior to the death of Clark. The defendants insist that the land in controversy was owned by the partnership, and in support of this contention it is shown that Henry A. Bragg occupied the land in 1887 under a school land contract, and that Bragg assigned this contract to John W. Clark on the 21st day of July, 1887. As before stated, the inventory of the decedent's estate shows that decedent held a one-half interest in this land which was appraised at $1,300, and Bragg testified upon the trial that he sold his interest to Clark & Howard, or supposed

that the firm of Clark & Howard were purchasing his interest in the land. The state issued a deed for the land to John W. Clark in February, 1889, upon payment of the remainder due on the contract, and this deed to Clark and the assignment to him of the school land contract vested him with legal title to the whole tract, in the absence of a showing that the purchase was made with partnership funds, and we do not think that the inventory and appraisement, or the evidence of Bragg, who merely testified to his understanding of the parties to whom the sale was made, can overthrow Clark's title to the whole estate, shown by the Bragg assignment and the deed of the state. There is another fact going to controvert this claim. Before the liquidation of the partnership, its effects are considered personalty, although vested in land, and when a partner dies his personal representative, not his heirs, succeed to his unliquidated interest therein; but the title to property belonging to the copartnership vests in the surviving partner, who alone is chargeable at law with the partnership debts and entitled to realize upon the partnership assets, and who is, unless the articles of agreement provide otherwise, vested with the exclusive right to and management of the firm assets for the purpose of closing the business and distributing such surplus as remains. 18 Cyc. 189.

In *Sternberg v. Larkin,* 58 Kan. 201, 37 L. R. A. 195, the syllabus is in the following language: "Real estate held and used for partnership purposes is to be treated, upon the dissolution of the partnership by the death of one of its members, and for the purpose of closing up its business, the same as personal property; and a settlement of the firm business, made by the surviving partner and the administratrix of the deceased partner, with a view to discharging the partnership debts and winding up the partnership business, by the terms of which it was agreed that the partnership real estate should be retained by the survivor and the title thereto should be vested in him, will be upheld when approved by the probate court in a

proceeding to which the administratrix and the heirs of the deceased partner were parties. And, in such case, title to such real estate passes to the surviving partner under such settlement and its approval by the probate court, without any formal conveyance of the deceased partner's interest." In *Galbraith v. Tracy,* 153 Ill. 54, 28 L. R. A. 129, it was held by the supreme court of Illinois that in equity the real estate of the partnership is regarded as standing on the same footing with personal property, no matter in whom the legal title may be vested. The same principle was recognized by this court in *Sullivan v. Smith,* 15 Neb. 476, where the absconding of one partner was held a virtual dissolution of the firm, vesting the other partner with power to make an assignment of the partnership effects for the benefit of creditors. We think, also, that section 5192 Ann. St. 1907, recognizes the right of a surviving partner to the property of the firm in authorizing the sale of the interest of the deceased partner in the partnership effects. The property in which the deceased partner had an interest is not to be sold, but only the interest which the deceased held therein. See, also, notes to *Woodward-Holmes Co. v. Nudd,* 27 L. R. A. 340 (58 Minn. 236); *Betts v. June,* 51 N. Y. 274; *Tremper v. Conklin,* 44 N. Y. 58. If this was partnership land, it would hardly be inventoried as belonging to the estate, but testator's interest in the copartnership would have been set out in the inventory.

We have given this branch of the case this much attention for the reason that in February, 1889, Thomas K. Clark, who had been appointed special administrator of the estate, before qualifying as executor, applied to the county court for leave to sell the personal estate of the decedent, but the record does not show whether the petition was granted and the sale made or what disposition was made of it; neither is there anything in the record to show the financial condition of the firm of Clark & Howard at the date of the testator's death, and whether it was necessary for the surviving partner to take

possession of the real estate of the copartnership and dispose of it for the payment of its debts. It may be that evidence can be produced on another trial showing that the decedent's interest in the copartnership was sold and that the land in controversy was a part of the assets of the firm. If such was the case, and the sale received the approval of the probate court, that, of course, would divest the plaintiff of any interest in the land. The estate has not yet been settled. The executor has not made his final report or received his discharge. If the land in controversy has been sold as a part of the assets of the copartnership, the executor on final settlement must account for the proceeds. If the land was not the property of the copartnership, and the record is barren of sufficient evidence to show that fact, then the title under the will of the testator vested in the plaintiff in 1900, and she is entitled to possession.

The defendants further insist that under our statute the executor is entitled to the possession of the real estate of the decedent until the estate is finally settled, and that, claiming through the executor, their possession cannot be questioned. The record shows that all claims against the estate have been paid, and, as the statute gives the executor the right of possession of the real estate of a decedent that he may receive the rents and profits and apply them to the discharge of debts due from the estate, it is doubtful if such right of possession continues after all debts have been discharged. Aside from this view of the case, the defendants do not claim to hold possession for the executor, but in their own right as owners of the fee, and, under the authority of *Lewon v. Heath*, 53 Neb. 707, the heir may maintain ejectment against such a claimant during the pendency of the administration proceedings.

We recommend a reversal of the judgment and remanding the cause to the district court for further proceedings.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

MARY EDITH EGGLESTON, APPELLEE, V. GEORGE E. QUINN, APPELLANT.

FILED APRIL 23, 1908. No. 15,161.

1. Bastardy: PLEA IN ABATEMENT. A plea in abatement cannot be used to raise the question of the sufficiency of the evidence to warrant holding a party for trial on the charge of being the father of an illegitimate child.
2. ———: DIRECTING VERDICT. Unless the evidence produced on the trial of a party charged with bastardy is of such a nature that the only rational conclusion to be drawn therefrom is that the charge against him has not been sustained, the court is not in error in refusing to direct a verdict in his favor.
3. ———: INSTRUCTIONS. It is error for the court to instruct the jury that the defendant on trial for bastardy must establish by a preponderance of the evidence the fact that he was not present at the time and place where prosecutrix claims the child was begotten.

APPEAL from the district court for Franklin county. ED L. ADAMS, JUDGE. *Reversed.*

Dorsey & McGrew, for appellant.

George W. Prather, contra.

DUFFIE, C.

The plaintiff filed a complaint charging the defendant with being the father of her illegitimate child. The jury found the defendant guilty as charged, and the district court entered judgment requiring the defendant to pay the plaintiff $850 in certain instalments and to give

security to the satisfaction of the court for the performance of the judgment. Defendant has appealed.

The defendant filed a plea in abatement, asserting that the district court had no jurisdiction to try the case, for the reason that on the preliminary hearing no facts were disclosed connecting him with the parentage of the child. The court overruled the plea, and this ruling is assigned as error. We do not think there was any error in the ruling of the court. A plea in abatement is not a proper proceeding to raise the question of the sufficiency of the evidence to warrant the holding of the defendant for trial in the district court. If the evidence taken before the examining magistrate was fatally defective in connecting the defendant with the charge alleged in the complaint, he might obtain his discharge on habeas corpus, but the office of a plea in abatement is not to discover whether a party charged with a crime or with the parentage of an illegitimate child is held on sufficient evidence to put him on trial in the district court.

The only evidence offered in behalf of the plaintiff was that of the prosecutrix herself, and, after her testimony had been heard, the defendant moved for a directed verdict acquitting him of the charge. An examination of the bill of exceptions compels us to say that the evidence offered in support of the charge was not of a satisfactory character, but we cannot say that it was so entirely lacking in credibility or directness as to warrant the court in taking the case from the jury. We cannot affirm that the testimony of the plaintiff could lead 12 reasonable minds to but one conclusion, namely, that the charge against him had not been established.

The prosecutrix on the preliminary examination testified that her child was born October 1, 1904, and that the last intercourse between herself and defendant that she could recall was had November 5, 1903. On the trial she testified that her last intercourse with the defendant was on or about December 23, 1903. The defendant

offered evidence which would warrant the jury in finding that he was not present at the time and place where complainant alleged the last intercourse between them took place. In his instructions to the jury the court in dealing with this phase of the case said (instruction No. 2): "The defendant, in addition to the general denial, has made the defense of what in law is called an alibi; that is, at the time and place the charge is attempted to be proved that he begot the child that he was at another place, and therefore could not have committed the act which would have made him the father of the child. If he has satisfied you of the truth of that proposition by the preponderance of the evidence, then the verdict should be not guilty." The action was a civil action, requiring the complainant to establish by a preponderance of the evidence the fact that the defendant was the father of her illegitimate child. A plea of not guilty entered by the defendant was equivalent to a general denial of the charge. Under this plea any evidence given to rebut the testimony offered by the plaintiff was admissible. The evidence that he was not present at the time and place where the complainant testified that the intercourse between them took place was competent and material evidence to rebut the charge. Any competent evidence which the defendant could adduce which rebutted the complainant's testimony, and was of equal weight and credibility with her own, entitled him to a verdict. He was not required to establish his defense by a preponderance of the evidence. Unless the testimony produced by the plaintiff, showing that the defendant was present at the time and place where she claimed the intercourse which begot her child occurred, was of more weight and credit than the evidence offered by the defendant that he was not present at such time and place, he was entitled to a verdict, and the court erred in telling the jury that the burden was on him to rebut the plaintiff's evidence in that regard by a preponderance of the evidence.

Error is also alleged in the refusal of the court to give the sixteenth instruction asked by the defendant. The record shows on its face that this instruction was given by the court, but the clerk certifies that this instruction was found among the instructions refused, and that to the best of his knowledge it was not given by the court. We cannot accept the certificate of the clerk as against the record presented for review. If the record does not present the facts as they occurred, the plaintiff should have moved the district court for a correction of the record, so that it might recite the true history of the case.

Other errors alleged need not be examined, as another trial will have to be had because of error in giving the second instruction. On another trial the court will undoubtedly use great care in the instructions given and in considering the instructions asked by the parties. A further discussion of the case would result in no benefit either to the parties or to the profession. We recommend a reversal of the judgment of the district court and remanding the cause for another trial.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for another trial.

REVERSED.

ED ROBERT, APPELLANT, V. O. O. HEFNER, APPELLEE.

FILED APRIL 23, 1908. No. 15,360.

Pleading: DEMURRER. In determining whether a general demurrer should be sustained to an amended petition, which supersedes the petition originally filed in the case, the court will not look beyond the pleading against which the demurrer is directed.

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Reversed.*

John C. Watson, for appellant.

Pitzer & Hayward and *Byron Clark, contra.*

DUFFIE, C.

The opinion of Mr. Commissioner OLDHAM on a former appeal of this case will be found in *Hefner v. Robert,* 76 Neb. 192. On the case being remanded to the district court, Robert, the plaintiff, obtained leave to file an amended petition, which alleges the purchase of the horse, Girton Royal Tom, and the making of the written contract between the plaintiff and defendant containing the terms and the conditions of the sale. While this written contract is set out in full in the opinion of Mr. Commissioner OLDHAM, we insert it here for convenience of reference. It is as follows: "Omaha, Neb., March 24, 1902. This contract entered into by and between Ed Robert, of Guthrie Center, Iowa, and O. O. Hefner, of Omaha, witnesseth as follows: That O. O. Hefner has this day sold the imported shire horse, named 'Girton Royal Tom,' for the sum of $1,300, upon the following terms and divisions, payable $800 in one coach horse, $100 cash in hand, and $400 due in one year, with 6 per cent. interest from date. This contract notes that the horse, Girton Royal Tom, is blemished in hind leg. He further agrees that in case that the horse does not recover from this affliction he shall be turned back to O. O. Hefner for $600 cash in hand and Ed Robert's note of $400 of even date herewith, due in one year at 6 per cent. It is further provided that if horse recovers from blemished condition of hind leg, then Ed Robert shall pay to O. O. Hefner his promissory note of $400. O. O. Hefner, Ed Robert." The amended petition, after setting out a copy of the above contract, proceeds to allege that at the date of the contract he paid the de-

fendant for the horse as in the contract provided; that the horse did not recover, and has not recovered, from the blemish mentioned in the contract, and that prior to the commencement of the action he tendered the horse to the defendant, who refused to accept or receive him, and that such refusal was unconditional; that the horse was of no value to the plaintiff, was a great expense and trouble for his care and feed, and, being unable to sell him for any sum whatever, plaintiff, long after the commencement of the action, gave the horse away; that defendant on demand, after his refusal to receive back the horse, refused, and still refuses, to pay the plaintiff the sum of $600 mentioned in the contract, and to return to the plaintiff his note for $400, to his damage in the sum of $1,000, for which judgment is demanded, with interest and costs. A general demurrer to this amended petition was sustained by the court, and, the plaintiff electing to stand on said petition, judgment was entered dismissing his petition and taxing him with the costs. From this judgment plaintiff has appealed.

We understand, from brief of appellee and from the oral argument on the submission of the case, that the district court, in sustaining the demurrer, proceeded upon the theory that a demurrer searches the whole record, and that the record on the first trial was a part of the record which might be examined to determine the sufficiency of the amended petition; that the petition upon which the first trial was had asked a rescission of the contract, and the plaintiff, having elected to sue for a rescission of the contract, is barred of an action for damages. The rule that a demurrer searches the entire record applies only when a demurrer is filed to a pleading subsequent to the petition or declaration. Both by the common law and by our statute a petition is demurrable only when it appears on its face that it does not state a cause of action. In *Null v. Jones*, 5 Neb. 500, the first paragraph of the syllabus is in the following language: "In determining whether a demurrer should be sustained to an *amended*

petition, which covers the entire ground of the original, and takes its place, the court will not look beyond the pleading against which the demurrer is directed." Again, the rule is well established that a pleading which has been superseded by an amended pleading is only evidence of the facts therein alleged, and must be introduced as any other evidence in order to be considered. *Shipley v. Reasoner,* 87 Ia. 555. The reason for this is evident: A party may, through inadvertence, mistake, or misinformation, make admissions of facts which have no existence, or are inconsistent with the statements of his amended pleading. If the original pleading is before the court for its consideration, without being offered in evidence, the party making such admissions has no opportunity to explain the circumstances under which they were made, and is thus faced with an admission which might, perhaps, be easily explained and its force wholly avoided.

The petition on its face states a cause of action for damages, and the demurrer was not well taken; but, if it should be held that the demurrer required the court to examine the pleadings upon which the first trial was had, still we think it should have been overruled. Because of the claim made that the first action was one for rescission of contract, and because the opinion of Mr. Commissioner OLDHAM accepts it in that light, we have looked into the record of the former trial to ascertain if appellee's claim is well founded. The district court in its charge to the jury on the first trial, and the attorneys on their presentation of the case to this court, assumed that the action was one of rescission, and the commissioner in his opinion, as was perfectly justifiable under such circumstances, decided the case upon the theory upon which it was presented. The fact is, however, that the petition upon which the case was first tried is one for damages, and that, as we view it, was the only action which the plaintiff could bring under the contract. When the horse was sold, both parties knew of the blemish, and, while the plaintiff was willing to risk $300 upon the

chance that the blemish would disappear, he required that the defendant, in case the horse did not recover, should obligate himself to receive back the horse, pay him $600 in cash, and surrender his note for $400. The blemish did not disappear, or at least it is so charged, and the plaintiff, in strict pursuance of his contract, offered to return the horse to the defendant. The defendant refused to receive him, or to pay the plaintiff $600 in cash and surrender his note. In this condition of the case the plaintiff had but one remedy, a suit for damages for breach of contract. The only election which the contract allowed was in favor of the defendant. When an offer to return the horse was made, defendant had his election to receive the horse, pay $600, and surrender plaintiff's note for $400, or he could refuse to carry out his contract and drive the plaintiff to his action for damages for the breach. After exercising his election, and putting the plaintiff to his action for damages, it was too late to recant, and say that he would carry out the contract if the plaintiff would make another tender of the horse. The plaintiff was not required to make more than one tender, and if that was unconditionally refused he could do what he chose with the horse, being answerable for its value, and sue for a breach of contract by the defendant. We cannot see where plaintiff was possessed of any choice of action. The law afforded him but one remedy, an action for damages, and this he pursued.

On any theory that may be advanced, the district court erred in sustaining the demurrer and dismissing plaintiff's petition, and we recommend a reversal of the judgment and remanding the cause for further proceedings not inconsistent with this opinion.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

FAIRBANKS, MORSE & COMPANY, APPELLEE, V. GEORGE BURGERT, APPELLANT.

FILED APRIL 23, 1908. No. 15,132.

Sales: PAROL EVIDENCE. In an action to recover the purchase price of machinery shipped to the vendee upon his written order therefor, it is competent for the vendee to allege and prove that the order was given upon the oral representations of the vendor that the machinery would do the work for which it was required, and that it failed to do so.

APPEAL from the district court for Pawnee county: WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

Story & Story, for appellant.

J. C. Dort, contra.

EPPERSON, C.

Defendant gave to plaintiff a written order, requesting plaintiff to ship to him a windmill and an outfit, with certain apparatus therein described. Said order contains the following provision: "All the above for the sum of $255, which amount I will pay you 60 days after outfit is erected and in good running order." Plaintiff shipped the goods described in said written order, and erected the same upon the defendant's farm, and later brought this action to recover the purchase price. The defendant, by his answer, among other things, alleged that the plaintiff represented at the time he gave the written order that the machinery therein described would do good work, and would grind shelled corn and ear corn and other grain, and that the windmill would furnish sufficient power to drive said grinder, and to grind both ear corn and shelled corn and other grain; that defendant relied upon the said representations, and, further, "that the said machinery, instead of being put in good running order, and doing

good work, and grinding shelled corn and ear corn and other grain, and the said windmill furnishing sufficient power to drive the grinder so furnished, was not put in good running order, and would not do good work, and would not grind either shelled corn or ear corn or other grain, and the said windmill would not furnish sufficient power to drive the said grinder.

Upon the trial of the cause the defendant testified that he told the plaintiff's sales agent at the time of, or prior to, the giving of the written order that he wanted the machinery for the purpose of grinding corn and other grain, and that said agent represented to him and told him that the machinery would do the work; that when he signed the written order for shipment he asked the plaintiff's agent where his written guaranty was; that the agent replied thereto that it was not in good running order unless it would grind, having reference, we suppose, to the clause in the written order above quoted providing for the payment after the outfit is erected and in good running order. The defendant further testified that he himself had no knowledge as to whether this machine would do the work that he wanted it for, and that he relied entirely upon the representations of the plaintiff's salesman; that he attempted, but was unable, to operate the machine after it was erected; that he tried it at several different times. He testified that plaintiff's agent attempted to operate it, and failed; that plaintiff's agent gave as a reason for its failure that there was not power enough in the wheel; that he told plaintiff's agent to take the outfit away. Mr. Smith was called by the defendant, and testified that he assisted in attempting to get the machinery to work, and failed. He said: "There was not power enough to run the grinder. The grinder was not adapted to that size mill, or the mill was not adapted to that size grinder, one way or the other." Mr. Smith had about 15 years' experience in the windmill business. At the conclusion of the testimony, the plaintiff moved that defendant's evidence be stricken out, for the reason that

it does not tend to prove the allegations of the answer or dispute the allegations of the petition, and for the further reason that it seeks to vary the terms of a written instrument. This motion was sustained by the trial court, and the jury directed to return a verdict for plaintiff. Upon the rendition of a judgment the defendant appealed.

We do not know what reason the trial court had for sustaining the plaintiff's motion, but it must have been either because he considered the evidence not responsive to the pleadings, or that it tended to change the terms of a written contract. The evidence was directly pertinent to one defense pleaded. It did not tend to vary the terms of a written contract. Were we to consider the written order a complete contract, we would surely be required to give force to the provision that the purchase price sued for was not payable until "after the outfit is erected and in good running order." The evidence of the defendant is to the effect that the machinery has never been in good running order. For this reason, if for no other, the judgment of the district court must be reversed and the cause remanded for a new trial. We do not doubt but that the defendant was entitled to rely upon the verbal representations of the plaintiff that the machinery in controversy would do the work for which he needed it. *Barnett v. Pratt,* 37 Neb. 349. Their said representations were the sole inducement, if defendant's evidence is to be believed, for the written order. The written order is not a complete contract, and, under the defendant's theory of the case, he was entitled to rescind the purchase or to refuse payment until the machinery was made to do the work which the plaintiff promised him it would do. *McCormick Harvesting Machine Co. v. Knoll,* 57 Neb. 790.

The district court erred in striking the defendant's testimony and in directing a verdict for plaintiff, and we recommend that the judgment be reversed and the cause remanded for a new trial.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

SCANDINAVIAN MUTUAL AID ASSOCIATION, APPELLEE, V. KEARNEY COUNTY, APPELLANT.*

FILED APRIL 23, 1908. No. 15,141.

1. **Taxation:** ASSESSMENT: MUTUAL INSURANCE COMPANIES: RESERVE FUND. A mutual insurance company, organized under the laws of this state for the mutual benefit of its members, and not for profit, is entitled to set off the amount of its outstanding benefit certificates against securities in its reserve fund set apart and devoted exclusively to the payment of such certificates.

2. **Case Followed.** *Royal Highlanders v. State*, 77 Neb. 18, adhered to.

APPEAL from the district court for Kearney county: ED L. ADAMS, JUDGE. *Affirmed.*

C. P. Anderbery, for appellant.

J. L. McPheely, contra.

EPPERSON, C.

The appellee is a mutual life insurance company, of this state, with its principal place of business at Minden, in Kearney county. It is conducted solely for the benefit of its members and their beneficiaries, and not for profit. For the purpose of protecting its members against an increased death rate, it established a reserve fund which was created by the contributions of its members. Under its by-laws the reserve fund was invested in securities, and is to be drawn upon only in the event that the death losses exceed the natural or expected rate. In 1906 the assessor required appellee to list said reserve fund for

* Rehearing denied. See opinion, p. 473, *post.*

taxation, which was done, and taxes were levied against it. Appellee paid the taxes under protest, and later filed its claim for the amount thereof with the county board. The county board rejected the claim, and an appeal was taken to the district court, where appellee filed its petition, alleging the facts. A general demurrer filed by the county was overruled, and upon the county's refusal to plead further a judgment was rendered in favor of the claimant. The county appeals.

The case involves the liability to taxation of the reserve fund of mutual insurance companies. It is conceded that this question was determined by this court adversely to the contention of the appellant in *Royal Highlanders v. State,* 77 Neb. 18. But it is argued that that case is wrong and should be overruled. Counsel for appellant, in his very able argument and brief, severely criticises the rule permitting taxpayers to deduct the amount of personal liabilities from their credits in determining the amount of taxable credits. In *State v. Fleming,* 70 Neb. 529, it was held: "In making a return of his taxable property under the provisions of chapter 73 of the laws of 1903 the taxpayer may deduct from the credits due him all just debts by him owing at the time of such return." This rule was adhered to in *Lancaster County v. McDonald,* 73 Neb. 453; *Olcson v. Cuming County, ante,* p. 209, and *Royal Highlanders v. State, supra.* Counsel suggests as a reason for the overruling of the *Royal Highlanders* case that the court did not take into consideration the provisions of section 27 of the revenue law (Comp. St. 1901, ch. 77, art. I), which was repealed by the act of 1903 (laws 1903, ch. 73), in determining what was in fact the intention of the legislature with reference to the assessment of credits. Section 27 of the old act provided: "In making up the amount of credits which any person is required to list, * * * he shall be entitled to deduct from the gross amount of credits the amount of all *bona fide* debts owing by such person." The new act nowhere expressly provides that net credits alone were

to be assessed, but provides for the assessment of credits, which the appellant contends means gross credits. It is true that this feature of the law was not reviewed in the *Royal Highlanders* case, but we find that it was considered at some length in *State v. Fleming, supra,* wherein Mr. Commissioner DUFFIE examined the identical question here presented, and that too with reference to the language of both the repealed section and its substitute in the new act. It is unnecessary to repeat the reasoning of that case. It is a sufficient answer to the present contention of the appellant. The discussion by Mr. Commissioner DUFFIE of this question was referred to in the dissenting opinion in *Lancaster County v. McDonald, supra,* as *obiter dictum;* but it was adopted by the majority opinion in that case, and also in the *Royal Highlanders* case. The question has been very much considered by this court, and the rule quoted from *State v. Fleming, supra,* may now be said to be fairly well established. Therefore the statute must be read as though it expressly provides that the net credits only of the taxpayer were to be assessed.

In support of the conclusions reached in the *Royal Highlanders* case, as announced in the opinion of BARNES, J., the court cited *Alabama Gold Life Ins. Co. v. Lott,* 54 Ala. 499; *Equitable Life Ins. Co. v. Board of Equalization,* 74 Ia. 178, and *Michigan Mutual Life Ins. Co. v. Common Council of Detroit,* 133 Mich. 408. It is now urged as a reason for the overruling of our former decision that these cases are not in point, in that they recognize the principle that present reserve values of outstanding policies only may be offset against the reserved fund, and not the contingent part of such outstanding policies. The plaintiff in the case of *Alabama Gold Life Ins. Co. v. Lott, supra,* was an old-line life insurance company. It was organized not only for the insurance of the life of its members, but also for profit to its stockholders. Whether or not the value of its reserve fund should be taxed to the extent of its excess over and above

the present value of the interest held therein by its assured is a question in which we are not concerned. It was there said: "A life insurance company, therefore, when its solvent credits are assessed for taxation under a statute, which declares that from them 'the indebtedness of the taxpayer shall be deducted, and that the excess only shall be taxed,' ought to be allowed to have deducted therefrom its 'premium reserve.'" It is apparent that a successful old-line insurance company will have continuously on hand assets in excess of their liabilities. As we understand *Alabama Gold Life Ins. Co. v. Lott,* it was determined that the company was not entitled to set off against its reserve fund the face value of its outstanding insurance, but that it was entitled to deduct its premium reserve, which constituted only a part of the fund subject to be taxed, and which represented the value of the particular amount which was set aside to meet losses occasioned by an increased death rate. The entire reserve fund created and held by mutual insurance companies, such as the appellee herein, and not organized for profit, corresponds to the premium reserve of the Alabama Gold Life Insurance Company, and presumably of other old-line companies. Under the law of this state mutual insurance companies, such as the appellee herein, are not permitted to create a reserve fund for any other purpose, and we cannot presume that such company has violated the law, nor that they have in fact created a fund or have become the owner of a credit which is not subject to the claims of its members.

It is true, as stated by appellant, that the policies held by the members of the appellee company have no present surrender value, but it does not necessarily follow that the interest which the members have in the reserve fund is a contingent demand to the extent that the fund may never be expended for the purposes for which it exists. It is a fund which belongs to the members of the society. It was created, as shown by the petition demurred to, for the purpose of paying death losses whenever the death

rate should become extraordinary or unusual, or whenever the usual and ordinary current assessments made upon the members would be insufficient to pay the liabilities of the company. This fund could be used for no other purpose. It was held by the society for the benefit of its members. As said in the opinion of LETTON, J., in *Royal Highlanders v. State,* 77 Neb. 18, 28: "while, in the case of ordinary business, and if considered without relation to the sections of the revenue law relating to the subject of insurance taxation, it may be questioned whether contingent liabilities are such debts as would be entitled to be offset against credits." But, considering the question of contingent liabilities with reference to the case before us, it is apparent that the liability of the appellee to eventually pay the fund in controversy to its members is not contingent. It is an event which is sure to occur. The only contingencies there are with reference thereto is the uncertainty with reference to the time when it will need to be expended, and the particular members whose beneficiaries will be paid from this fund, instead of from the fund collected by the usual and ordinary assessments levied upon the membership. But that this fund will be paid for the purposes for which it is created is an absolute certainty. It stands appropriated for that purpose. In *Alabama Gold Life Ins. Co. v. Lott, supra,* it was held substantially that the value of the interests in the reserve fund owned by the assured could be deducted from the credits. The interest thus deducted was considered and adjudged to be the amount of its "premium reserve." The principle announced in this case and the others above cited were in point, and a further consideration thereof has strengthened our conviction that *Royal Highlanders v. State* should be adhered to.

We recommend that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed November 6, 1908. *Rehearing denied:*

Taxation: ASSESSMENT: CONSTITUTIONAL LAW. The revenue law of this state, which permits, under the interpretation of this court, a taxpayer to deduct his *bona fide* debts from his gross credits, is not in conflict with section 1, art. IX of the constitution.

GOOD, C.

The opinion in this case, by Commissioner EPPERSON, is reported, *ante,* p. 468. Defendant has asked for a rehearing upon a question which was raised and argued, but which is not decided nor discussed in the opinion. Defendant's contention which was not decided in the opinion is that our present revenue law, which provides for the assessment of net credits rather than gross credits, is unconstitutional. Section 10911, Ann. St. 1907, required that all property in this state not expressly exempt therefrom shall be subject to taxation and shall be valued at its actual value. Section 10904 defines the word "credit." In *State v. Fleming,* 70 Neb. 529, it was held that the term "credit" meant "net credit," and it was there held that from the gross credits the taxpayer was entitled to deduct all his *bona fide* debts, and that he was required to list for taxation only his net credits. Defendant urges that the revenue law as thus interpreted by this court is in conflict with section 1, art. IX of the constitution, which is as follows: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants,

showmen, jugglers, inn-keepers, liquor-dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

Defendant urges that allowing the debts to be set off or deducted from the gross credits of the taxpayer, in effect, permits such portion of the gross credits of the taxpayer as equals his debts to be released from assessment and taxation, and results in levying taxes unequally upon the taxable property in the state which is not exempt from taxation. In support of its contention we are cited to the case of *Supreme Lodge M. A. F. O. v. Board of Review*, 223 Ill. 54. The supreme court in Illinois in that case held unconstitutional a statute which specifically exempted from taxation all the money collected and on hand within the state of fraternal beneficiary societies, and used exclusively for the purpose of such societies, and not for pecuniary profit. The constitutional provisions of Illinois are identical with the constitutional provisions of this state above quoted. An examination of the case does not, in our opinion, support the contention made by defendant. The Illinois statute which was held unconstitutional exempted all of the money of fraternal beneficiary societies. There was no question there of ascertaining the value of the society's credits or of its property, nor was there any question involved of the taxation of net credits instead of gross credits. If allowing the debts of the taxpayer to be deducted from his credits for the purpose of assessment is unconstitutional, then the section of our former revenue law which provided specifically for the taxation of net credits was unconstitutional. That section was in force for a great many years, and, so far as we are aware, its validity was never questioned upon the grounds now urged by the defendant. The legislative and executive branches of the state government believed that section constitutional, and taxpayers and the profession acquiesced in the validity of that section for

many years. While this is not conclusive as to its constitutionality, it is at least significant, and has some weight. If defendant's position is well grounded, then choses in action, although credits and property, must be listed for taxation by the owner thereof, whether a bank or other corporation, or individual. Defendant's contention would require every bank to list for taxation all of its money and its bills receivable, but such a system has never been adopted in this state, nor do we think that it was contemplated by the framers of the constitution that it should be. As pointed out in the opinion by Commissioner DUFFIE in *State v. Fleming, supra,* if the taxpayer were required to list his gross credits, and were not allowed to offset therefrom his *bona fide* debts, it would result in compelling him to pay taxes in some instances of many times the value of the net worth of the taxpayer. It would result in requiring every bank to pay taxes upon several times the value of its capital stock, and would practically result in bankrupting many of the financial and manufacturing institutions of the state. Such a construction of the constitution was never contemplated by its framers. In *Mortensen v. West Point Mfg. Co.,* 12 Neb. 197, it was held that section 17 of the revenue act of 1869, providing for the assessment of the stock of corporations, did not conflict with section 1, art. IX of the constitution. If the section regarding the taxation of the capital stock of corporations, including banks, does not violate the provisions of section 1, art. IX of the constitution, we do not think it can be said that the provisions of the present revenue law, which, as interpreted by this court, require the assessment of net credits, instead of gross credits, can be held a violation of that section of the constitution.

It follows that the original opinion filed in this case should be adhered to, and the motion for rehearing should be denied.

By the Court: For the reasons given in the foregoing

opinion, the former opinion in this case is adhered to, and the motion for rehearing is

OVERRULED.

JEANETTE P. BECKER, APPELLANT, V. J. F. WILCOX, APPELLEE.

FILED APRIL 23, 1908. No. 15,157.

1. **Lotteries: STATUTE: CONSTRUCTION.** The rule that courts will not permit the recovery of the consideration paid upon an executed contract prohibited by statute does not apply to the vendee of a lottery ticket, for whose benefit the statute was enacted.

2. **Case Distinguished.** *Bowen v. Lynn*, 73 Neb. 215, distinguished.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

L. D. Holmes, for appellant.

James B. Kelkenney, contra.

EPPERSON, C.

The petition and the answer herein in effect alleged and admitted that the defendant was the owner of a lottery ticket issued to him by the Devore Diamond Company, which he sold to the plaintiff. This action is brought to recover the purchase price. The court below sustained defendant's motion for a judgment on the pleadings. Plaintiff appealed.

The lottery ticket is substantially the same as that considered by this court in *Bowen v. Lynn*, 73 Neb. 215. It was there held that the purchaser of such lottery ticket or contract could not recover under the provisions of section 214 of the criminal code, which provides for the recovery by civil action of money lost at gambling. The plaintiff herein does not rely upon the provisions of that section; but it is her contention that, because section 225 of the

criminal code prohibits the sale of lottery tickets and imposes a penalty upon the vendor, she is not *in pari delicto,* and, as there was a complete failure of consideration for the purchase price paid to the defendant, she is entitled to recover. It is the general rule that one *in pari delicto* cannot enforce an executory contract, and, moreover, cannot recover back the amount paid upon an executed illegal contract. Cases are numerous which refuse recovery to one who has become the victim of a gambling adventure or of a lottery scheme, and such decisions are invariably founded upon the maxim: *"In pari delicto potior est conditio defendentis."* On the other hand, it is a well-established rule that, where one has paid money for an illegal consideration, he can, on account of its illegality, recover the same when he is not *particeps criminis* and is not *in pari delicto.* The sale of lottery tickets was not prohibited by the common law. It is made illegal in this state by section 225 of our criminal code, which provides: "If any person or persons shall vend, sell, barter, or dispose of any lottery ticket or tickets, order or orders, device or devices, of any kind, for, or representing any number of shares, or any interest in any lottery, or scheme of chance, * * * every such person shall be fined in any sum not exceeding five hundred dollars, or be imprisoned not exceeding six months, or both, at the discretion of the court." This, it will be observed, imposes no penalty upon the vendee. Had the statute declared the sale of lottery tickets illegal, and had it imposed a penalty upon both the vendor and vendee, or had it prescribed no penalty whatever, there can be no doubt but that the parties to a contract for the sale thereof, whether executed or executory, would be *in pari delicto,* and neither could appeal to the court for relief. But, as the legislature imposed the penalty upon the vendor only, it would seem that the statute was intended for the protection of purchasers of lottery tickets, and for this reason the purchaser by participating in the illegal transaction is neither *particeps criminis* nor *in pari delicto.*

A review of many of the authorities construing the rights of parties under a prohibited contract may be found in *Storz & Iler v. Finkelstein,* 46 Neb. 577. It is unnecessary to again quote from the same authorities. Especially, however, we desire to direct attention to *Tracy v. Talmage,* 14 N. Y. 162, and *Sacketts Harbor Bank v. Codd,* 18 N. Y. 240. In *Storz & Iler v. Finklestein, supra,* it was held: "No action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law." That rule is not applicable to the case at bar. It is to be followed in actions brought for the enforcement of executory contracts, or in actions founded upon any contract where the parties are *in pari delicto.* In *Gray v. Roberts,* 12 Am. Dec. 383, 2 A. K. Marsh. (Ky.) *208, it was held: "A contract in violation of law is void, and the courts will neither enforce payment nor enable one who has paid money thereon to recover it, if both parties are *in pari delicto;* but, if the law violated was intended to protect one of the parties against the acts of the other, they are not *in pari delicto,* and the party designed to be protected may recover money paid in violation of such law. Money paid for lottery tickets, where the lottery is forbidden by law, may be recovered, for the law is designed for the purchaser's protection; but, if the money was paid under a judgment of a court of competent jurisdiction, it cannot be recovered." That case in principle is identical with the case at bar. In the opinion we find the following: "If both parties are equally guilty of a breach of the law, a court of justice cannot interpose its aid in behalf of either; for it is a settled rule that *pari delicto potior est conditio defendentis;* but, where the transaction is in violation of a law made for the protection of one party against the acts of the other, they are not equally guilty, and the innocent party, when he has paid money upon such a transaction, may, without doubt, recover it back. * * * The act of 1769, for preventing and suppressing private lotteries, which was the law in force at the time of the

contract in this case, appears manifestly, from the preamble of the act, to have been designed by the legislature to protect the interest of others against the devices of those who should set up a lottery; and the enacting clause is made to operate upon the latter only. For it is only persons who set up the lottery, and not those who purchase the tickets, that offend against the provisions of the act."

The rule originated in England, and was adopted by American courts at an early date. The case of *Jaques v. Golightly*, 2 W. Black. *1073, was an action to recover money paid for the insurance of lottery tickets. Blackstone, J., said: "These lottery acts differ from the stock-jobbing act of 7 Geo. II, c. 8, because there both parties are made criminal and subject to penalties." In commenting upon that case it is said in *Tracy v. Talmage, supra:* "The rule here suggested for determining whether the parties are *in pari delicto* seems reasonable and just. There are, undoubtedly, other cases in which the parties are not equally guilty; but it is safe to assume that, whenever the statute imposes a penalty upon one party and none upon the other, they are not to be regarded as *par delictum*. In *Browning v. Morris*, 2 Cowp. (Eng.) 790, Lord Mansfield, after referring with approbation to the case of *Jaques v. Golightly*, 2 W. Black. *1073, reiterates the argument of Blackstone, J., in that case. He says: 'And it is very material that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side—upon the office-keeper.'" "This distinction seems to have been ever afterwards observed in the English courts, and, being founded in sound principle, is worthy of adoption, as a principle of common law in this country." *Inhabitants of Worcester v. Eaton*, 11 Mass. *368. In *Mount & Wardell v. Waite*, 7 Johns. (N. Y.) 434, an action to recover back money which the plaintiff had paid to defendant for issuing lottery tickets contrary to the statute, Chief Justice Kent said: "The plaintiffs here committed no crime in

making the contract. They violated no statute, nor was the contract *malum in se.* I think, therefore, the maxim as to parties *in pari delicto* does not apply, for the plaintiffs were not *in delicto.*"

I am unable to find recent American cases holding to this same doctrine with reference to moneys paid for lottery tickets, but the same rule has recently been applied to other contracts prohibited by statutes which imposed a penalty only upon one party. In *Mason v. McLeod,* 57 Kan. 105, 41 L. R. A. 548, it was held that the purchaser could recover back money paid by him under a contract prohibited by statute for the purchase of a patent right, and the same court, in *Latham Mercantile & Commercial Co. v. Harrod,* 71 Kan. 565, held: "A policy holder in a fire insurance company not authorized to transact business in this state is not *in pari delicto* with the company or its agents." Cases are numerous holding that, under statutes prohibiting contracts for the payment of usury, the party injured may bring an action for the excess of legal interest. The theory of all such cases is that, inasmuch as the statutes were made for the protection of the party injured, he is not *in pari delicto,* and he may recover the amount paid for the illegal promise of the other party. The reasoning of the English cases and of the early American cases above cited with reference to lottery tickets and lottery schemes have appealed to us as the better rule. We are unable to find any case to the contrary, unless *Bowen v. Lynn, supra,* may be considered as such. It seems, however, that, if we are right, then the conclusion reached in *Bowen v. Lynn* should have been different, for the contracts are substantially the same. The penalty imposed by section 224 upon the operators of a lottery is the same as that imposed by section 225 upon the vendors of lottery tickets. It was said in the opinion in *Bowen v. Lynn* that section 224 affords the losing party no civil remedy, and that the action is sought to be maintained under the proviso of section 214. It is apparent, therefore, that the reasoning

in *Bowen v. Lynn* is not contrary to the conclusion we have reached in this case. Undoubtedly, had the plaintiff there relied upon the rule adopted by the early American courts, instead of attempting to recover under the provisions of section 214 of the criminal code, the conclusion would have been different.

We recommend that the judgment of the district court be reversed and this cause remanded for further proceedings.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

JOHN F. PIPER, APPELLANT, V. JOHN NEYLON, APPELLEE.

FILED APRIL 23, 1908. No. 15,159.

1. **Evidence:** ADMISSIBILITY. The declaration of the payee of a promissory note, who is not a party to the action, and who has no interest in the result of the litigation, is inadmissible in evidence against the purchaser of such note for the purpose of disproving his ownership.

2. **Appeal:** INSTRUCTIONS. It is not error for the trial court to refuse to give proper instructions in the form requested, if the same principles are embodied in those given by the court on his own motion.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed.*

P. E. Taylor and *Rose & Comstock,* for appellant.

Shepherd & Ripley and *J. B. Strode, contra.*

EPPERSON, C.

Plaintiff, claiming to be an innocent purchaser of a promissory note, brought suit thereon against the defendant, the maker thereof. Defendant admitted the execution of said note, denied that the plaintiff was an innocent purchaser and *bona fide* holder thereof, and as a defense thereto alleged that said note was obtained by misrepresentations of the payee, plaintiff's assignor, and that there was a failure of consideration. The defendant prevailed upon trial in the district court, and plaintiff appealed.

For the purpose of proving that the plaintiff was not the *bona fide* owner of the note, defendant introduced in evidence two letters written to him by the payee, in which he stated that he had sold the note to the Farmers Bank of Lyons. One of these letters was written prior to the date plaintiff claims to have become the owner of the note, and one subsequent thereto. The letters were identified by the payee himself, who was called as a witness by the defendant. The admission of these letters was error. The declaration of the payee of a promissory note, who is not a party to the action, and who has no interest in the result of the litigation, is inadmissible in evidence against the purchaser of such note for the purpose of disproving his ownership. See *Zobel v. Bauersachs*, 55 Neb. 20, and *Commercial Nat. Bank v. Brill*, 37 Neb. 626. Later in the trial the payee of the note was called as a witness for plaintiff, and testified to the fact of the sale of the note to the plaintiff herein, and upon his cross-examination defendant again required him to identify the letters above referred to, and again offered them in evidence. It is the defendant's present contention that, because the letters should have been admitted to impeach the testimony of this witness, their former admission was without prejudice. This cannot be said to be the rule. They were not admitted upon the defendant's second offer, nor were the jury instructed to consider them for the sole purpose of determining the witness' credibility. The

law of evidence would not permit their admission for any other purpose. As they were introduced in the manner and for the purpose above stated, they went to the jury with all the appearance of substantive evidence relative to an important issue in the case.

At the conclusion of the trial plaintiff asked for a directed verdict. This the court properly refused, inasmuch as there was evidence, unnecessary to quote, the tendency of which was to impeach the plaintiff's character as a *bona fide* purchaser, and also evidence tending to support the defense that there was a failure of consideration.

Plaintiff requested the giving of many instructions, which the court refused to give in the form submitted. The instructions given, however, contained the same principles as were embodied in those refused, except two. One of these, if given, would have directed a verdict for plaintiff. This question has been disposed of. The other instruction refused contained the rule that "a party calling and examining a witness thereby invites the jury to credit his sworn testimony, and by so doing affirms the general credibility of the witness for truth and veracity." This instruction was not applicable to the case. No attempt was made to impeach the general credibility of any such witness, and the only attempt to impeach the testimony of any witness was the instance above referred to, relating to the second offer of certain letters.

We recommend that the judgment of the district court be reversed, and the cause remanded for a new trial.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

STATE BANK OF GOTHENBURG, APPELLEE, V. T. L. CARROLL ET AL., APPELLANTS.

FILED APRIL 23, 1908. No. 15,137.

1. **Appeal:** RULINGS: REVIEW. This court will not review the ruling of the district court permitting a third party to be substituted in lieu of the original plaintiff, where no exception has been taken to such ruling.
2. **Limitations of Actions:** PARTIES: SUBSTITUTION. The substitution of a third party for the original plaintiff in an action is not the commencement of a new action, and the statute of limitations is not available as a defense, if the original action was begun before the bar of the statute was complete.
3. **Checks:** PRESENTATION: DELAY. Mere delay on the part of the holder of a check in presenting it for payment to the bank on which it is drawn will not release the drawer and indorser of the check from liability, unless such delay caused a loss.
4. **Evidence** examined and set out in the opinion, *held* to require a verdict for the plaintiff.
5. **Appeal:** INSTRUCTIONS: REVIEW. This court will not review any alleged errors in the giving and refusing of instructions, where the evidence compelled the verdict which was rendered.

APPEAL from the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

E. A. Cook and *John A. Sheean*, for appellants.

Warrington & Stewart and *H. M. Sinclair, contra.*

GOOD, C.

This action was originally instituted by H. V. Temple, as receiver of the State Bank of Gothenburg, against Thomas L. Carroll and the Union Pacific Railroad Company to recover the amount of a check drawn upon the People's State Bank of Gothenburg by Carroll in favor of an agent of the Union Pacific Railroad Company, which had been indorsed and transferred by the railroad company to the State Bank of Gothenburg. The People's

State Bank of Gothenburg closed its doors before the check was presented to it for payment. Subsequently, the State Bank of Gothenburg passed into the hands of a receiver, who instituted this action to recover upon the check. Answers were filed and a trial had, resulting in judgment in favor of the defendants. This judgment of the district court was reversed by this court in *Temple v. Carroll,* 75 Neb. 61. After the cause was remanded to the district court, the State Bank of Gothenburg was substituted as plaintiff in the action, and filed an amended and substituted petition. Defendants answered separately. Carroll pleaded the statute of limitations, denied that the plaintiff had succeeded to the rights of Temple, receiver, and averred that at the time the check was given he had funds in the bank upon which it was drawn more than sufficient to pay the same, and alleged that plaintiff was negligent in failing to present the check to the bank upon which it was drawn until after it had suspended payment, and that by reason of such negligence he was exonerated from liability upon the check. The defendant railroad company's answer was substantially the same, except that it did not deny the right of the plaintiff to be substituted for the original plaintiff. Plaintiff replied to both answers with a general denial. A trial resulted in a verdict and judgment for the plaintiff. The defendants have appealed.

The principal grounds for reversal relied upon by the appellants are: First, that plaintiff can not maintain the action as a substituted plaintiff; second, the statute of limitations; third, the insufficiency of the evidence to sustain the verdict; fourth, alleged error in the instructions.

With reference to the first question, the record shows that upon the 8th day of October, 1906, the State Bank of Gothenburg, upon application to the court, was given leave to be substituted as plaintiff in the action in the place of H. V. Temple, receiver, and to file a petition in the cause. Defendants were each given leave to file a

separate answer thereto. There is nothing in the record to show what evidence or reason was given to the court for substituting the bank in place of the receiver as plaintiff in the action. It was conceded on the oral argument, however, that the receiver had been discharged, and the bank had resumed its functions as a banking institution. But appellants insist that it is essential that the record should show some ground or some reason for making the substitution, and that in the absence of such a showing the plaintiff cannot maintain the action. When the record is silent, the presumption obtains in favor of the regularity of the court's procedure, and that a proper and sufficient showing was made. As no exception was taken to the order permitting the substitution, this court will not review the ruling of the court thereon.

The plea of the statute of limitations was based upon the theory and assumption that the filing by the substituted plaintiff of an amended and substituted petition was the commencement of a new action, and that, more than five years having elapsed prior to the filing of such petition, the action was barred. It is conceded that the original action was begun previous to the running of the statute. We think the rule is generally well settled that the substitution of one party plaintiff for another in a pending action is a continuation of the original rather than the commencement of a new action. It is the same cause of action, only another party has succeeded to the rights of one of the litigants, and in our practice such party may be substituted as the real party in interest in lieu of the one who commenced the action. Since the statute of limitations had not run at the commencement of the original action, it follows that it can be no defense in this action.

The evidence discloses that on the afternoon of the 27th day of May, 1901, the Union Pacific Railroad Company received the check in controversy in payment of a freight bill. Through its agent the check was indorsed and transferred to the plaintiff after banking hours on

that day, and the agent received Omaha exchange in payment of the check. The usual banking hours in Gothenburg were from 9 A. M. to 4 P. M. The evidence also tends to show that the banks sometimes opened a little earlier and kept open a little later, at least for the transaction of some lines of business. On the following morning Carlson, the president of the State Bank, before banking hours, learned that the state bank examiner was in Gothenburg, and he had some reason to believe that the People's State Bank might be in financial difficulties. Shortly after 8 o'clock Carlson went to his own bank, and about 8:30 took the check in question, and went to the People's Bank to present it for payment. That bank was not then open. He then went to a barber shop, and later returned to the People's Bank to present the check. He claims that it was about 9 o'clock when he returned. The evidence of defendants tends to show that it was about 10 o'clock. At this time payment of the check was refused, and Carlson was informed that the bank was under the control of the state bank examiner. Carlson did not return to his own bank from the time he left it at about 8:30 until after he had been refused payment of the check. During Carlson's absence from his bank an employee of the People's Bank, under the direction of the state bank examiner, took certain checks held by that bank and drawn upon Carlson's bank to the latter bank, and received the money thereon. At the same time he made inquiry as to whether the State Bank held any checks drawn against the People's Bank. The employee at the State Bank, not having any knowledge of the check in the hands of its president, informed the representative of the People's Bank that it had no checks against it. The evidence shows that it was the usual custom of the banks to "clear" each day between the hours of 3 and 4 in the afternoon. The appellants contend that, if the president of the plaintiff bank had left this check in the State Bank, it would have been paid by the representative of the People's Bank when the checks

were presented by him for clearing, or that, if the president had notified the other employees of the State Bank that he had the check, it would have been paid by the People's Bank out of funds then in its possession. Under this state of affairs, the appellants claim that the appellee was negligent, and that by reason of its negligence the check was not paid, and, therefore, they should be relieved of any liability. Carroll at the time had a much larger sum on deposit in the People's Bank than the amount of his check. It is conceded that the check has not been paid, and the appellants are liable thereon, unless they are relieved by some act of negligence on the part of the plaintiff. Let us analyze the evidence and see whether any negligence exists. In the first place, the check could not have been presented on the 27th day of May, because it was not received until after banking hours. It being the usual custom of the banks to clear between 3 and 4 o'clock in the afternoon, plaintiff could not anticipate, and had no reason to anticipate, that any representative of the People's Bank would attempt to clear with it in the early forenoon. Under these circumstances, it could not, to our minds, be considered an act of negligence on the part of plaintiff for its president to take the check out of the bank. It does appear that he was using due diligence to present the check promptly to the People's Bank, and that he was there knocking at the door before the usual time of opening. According to his testimony, he was there at the usual time of opening and gained admission, but did not obtain payment. But, taking the evidence most unfavorable to the plaintiff, he did present the check as early as 10 o'clock, and was refused payment. Under these circumstances, we think the evidence would not sustain any charge of negligence. But, beyond this, the rule of law is well recognized that, to predicate a right of recovery or defense upon the negligence of another, such negligence must be the proximate cause of the injury. The evidence in this case does not show that, if the check had been in the plaintiff bank

when the representative of the People's Bank presented checks against it, it would have been paid. We think the inference is to the contrary, because the evidence shows that the employee of the People's Bank went to the plaintiff bank pursuant to the directions of the bank examiner, who was then in charge of the People's State Bank. He was collecting the assets that belonged to the People's Bank. He certainly had no authority and no right to pay out the funds of the bank after he had taken charge. He would have no right to prefer one creditor over another, and we cannot assume that he would have done so. Again, the evidence does not show that the People's Bank was ever open for business or ever paid a check or demand upon it after the time the check came into the possession of the plaintiff. Under these circumstances, even if it should be conceded that the plaintiff was negligent, the appellants in this case were not in anywise injured thereby. Under this evidence, we think that only one verdict could have been properly rendered, and that was in favor of the plaintiff in the action. The evidence is not only sufficient to sustain the verdict, but is such as to preclude any other verdict.

In this view of the case, it is unnecessary to consider any instructions that may have been given. Whether erroneous or not, they were not prejudicial. It follows that the judgment of the district court should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

KEARNEY COUNTY, APPELLANT, V. GEORGE W. ELSAM, APPELLEE.

FILED APRIL 23, 1908. No. 15,140.

Insane Persons: COMMITMENT: LIABILITY OF ESTATE. Section 9637, Ann. St. 1903, does not authorize a county to recover from the estate of an insane person the costs and expenses paid by such county, incident to the examination of such person before the commissioners of insanity and to his commitment and transportation to the hospital for the insane.

APPEAL from the district court for Kearney county: ED L. ADAMS, JUDGE. *Affirmed.*

C. P. Anderbery, for appellant.

M. D. King, contra.

GOOD, C.

This action was brought by Kearney county against George W. Elsam, insane, to recover the costs and expenses paid by said county, incident to Elsam's examination before the commissioners of insanity and to his commitment and transportation to the state hospital for the insane. A general demurrer to the petition was sustained, and, plaintiff electing to stand upon its petition, judgment of dismissal was entered. Plaintiff has appealed.

But one question is presented for determination, viz.: Is the estate of an insane person liable for the costs incident to his examination before the commissioners of insanity and the costs of commitment and transportation to the hospital for the insane? The precise question, so far as we are aware, has not been previously before this court. The items of costs sought to be recovered include the fees of the commissioners of insanity, the sheriff and the witnesses. All of these items are costs that are fixed and provided for by the statute, which requires that they shall be paid by the county. There is no provision in

the statute to authorize the taxing of the costs originally to the insane person, or to his estate. Costs were not taxable or recoverable at common law, and the only authority for taxing and recovering costs must be found in the statute. Appellant contends that section 9637, Ann. St. 1903, authorizes the recovery of the costs paid by the county from the estate of the insane person. That section is as follows: "The provisions herein made for the support of the insane at public charge, shall not be construed to release the estates of such persons, nor their relatives, from liability for their support, except from the cost of board, care, and treatment while in the hospitals of the state, which cost of board, care, and treatment shall be borne by the state; and the commissioners of the several counties are authorized and empowered to collect from the property of such patients, or from any person or persons legally bound for their support, any sum paid by the county in their behalf, as herein provided; and the certificate from the superintendent, and the notice from the auditor of state, stating the sums charged in such cases, shall be presumptive evidence of the correctness of the sum so stated. If the board of county commissioners, in the case of any insane person who has been supported at the expense of the county, shall deem it a hardship to compel the relatives of such patient to bear the burden of his or her support, they may relieve such relatives from any part or all of such burden as may seem to them reasonable and just."

In *Baldwin v. Douglas County*, 37 Neb. 283, this section of the statute was held to be unconstitutional, at least to the extent that it seeks to hold the relatives of insane persons liable for the support, care and maintenance of the insane persons while in the asylum. That action, however, was begun in 1889, and was tried and judgment rendered in the district court for Douglas county prior to the enactment of this section in its present form, though the opinion in the supreme court was written long after the passage of the act. This fact seems to

have been overlooked by the writer of the opinion in that case. That action was brought to recover for the support, maintenance and care of an inmate of the asylum. It will be observed that the section itself exempts the estate of the insane person and the relatives from the costs of board, care and treatment, which shall be borne by the state. It does not appear to the writer of this opinion that it was necessary to determine or consider the constitutionality of this section of the statute in that case. It appears that the section itself denied the very right to recover for the items sought to be recovered in that action, so that it was wholly unnecessary to declare this section unconstitutional in order to defeat a recovery. In addition, we may say that the reasoning which led to holding this section unconstitutional does not appeal to us as sound. Under the circumstances, we regard the opinion in the *Baldwin* case as of doubtful authority as a precedent to be followed. We have, therefore, disregarded the *Baldwin* opinion, and will proceed upon the assumption that the section is not unconstitutional in so far as it seeks to make the estates of insane persons liable for any sum paid by the county in their behalf.

This statute only authorizes the county commissioners to collect sums paid by the county in behalf of the insane person. Can the costs of his examination before the commissioners and of his commitment and transportation to the hospital for the insane properly be considered as expended in behalf of the insane person? It seems rather that the community is more interested in having the sanity of an individual determined than he is. If he be in fact insane, he is not responsible for his acts, and he may be a menace to the community and the lives of its citizens. The public is interested in having his mental status determined, and, if found insane, in having him restrained for the protection of the public. It follows that the costs expended are on behalf of the public, rather than on behalf of the individual. Again, the section provides that the certificate from the superintendent of the hospital

shall be presumptive evidence of the correctness of the sum. It is apparent that the superintendent of the hospital could have no personal knowledge of the expenditures and costs in the examination and commitment of the insane person. It is not presumed that the legislature intended to make the certificate of a person who could have no actual knowledge presumptive evidence of the amount of the expenditures. We think it is a fair interpretation of the statute that any sums paid by the county in behalf of the insane person, as provided in the section, means sums expended after the patient has been placed in the hospital, and while he is under the supervision of the superintendent of the hospital.

The conclusion reached herein is supported by the opinion of the supreme court of Iowa in the case of *In re Estate of Westlake v. Scott County,* 125 Ia. 314. In that case the supreme court of Iowa interpreted a statute which is almost identical with the section of our statute above quoted, and in a well-reasoned opinion held that it was not the intention of the statutory provision to render the estate of an insane person liable for the expenses incident to a legal investigation of the sanity of the person who is adjudged insane, nor the expenses of committing such person to the state hospital, nor the cost of transporting him thereto, in consequence of such commitment. We are forced to the conclusion that the estate of an insane person is not liable under this section for the costs incident to his examination on the question of his sanity and of his commitment and transportation to the hospital for the insane.

The judgment of the district court is right, and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

EDWARD M. ALLISON V. FIDELITY MUTUAL FIRE INSURANCE COMPANY, APPELLEE; ROBERT B. HOWELL, RECEIVER, APPELLANT.

FILED APRIL 23, 1908. No. 15,501.

1. **Insurance**: MUTUAL COMPANIES: REINSURANCE. Mutual fire insurance companies organized under the provisions of chapter 45, laws 1897, are not authorized to transact a reinsurance business.
2. ———: REINSURANCE: ASSESSMENTS. A contract of reinsurance made by a mutual insurance company organized under the provisions of chapter 45, laws 1897, is *ultra vires*, and assessments cannot be collected on account of such policy.
3. ———: ———: ULTRA VIRES CONTRACTS: ESTOPPEL. In an action by one insurance company against another, both of which were organized under the provisions of chapter 45, laws 1897, to recover assessments on policies of reinsurance, the reinsured company is not estopped from pleading the defense of *ultra vires*.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Affirmed.*

Isaac E. Congdon, for appellant.

Baldrige & De Bord, contra.

GOOD, C.

The Merchants & Manufacturers Mutual Fire Insurance Company and the Fidelity Mutual Fire Insurance Company were each mutual fire insurance companies organized under chapter 45, laws 1897, entitled "An act to authorize the organization of mutual insurance companies to insure city and village property against loss by fire, lightning, tornado, cyclone, or windstorm, and to regulate their conduct." Ann. St. 1907, secs. 6544-6563. Both companies failed and passed into the hands of receivers in actions instituted in the district court for Douglas county. In the case of *Wells v. Merchants & Manufacturers Mutual Fire Ins. Co.,* Howell was appointed as receiver of

that company, and, in the case of *Allison v. Fidelity Mutual Fire Ins. Co.*, Leigh was appointed receiver of the last mentioned company. Howell, as receiver of the Merchants company, filed in the *Allison* case a claim against the Fidelity company for assessments levied against the Fidelity company by the Merchants company and by the district court; the former assessments being made before the company passed into the hands of the receiver, and the latter being ordered by the court in the receivership proceedings. The Merchants company had issued to the Fidelity company a large number of policies, whereby it undertook to reinsure the Fidelity company on a number of risks written by it. The assessments which formed the basis of the claim were on these reinsurance policies. On the trial to the district court, judgment was rendered in favor of the defendant, the Fidelity company, and Howell, as receiver of the Merchants company, has appealed.

The district court held against the claim of the plaintiff upon the ground that the companies were not authorized to transact a reinsurance business, and that the acts of reinsurance were *ultra vires* and void, and there could, therefore, be no recovery for assessments on the policies of reinsurance. It is a well known and recognized principle of law that a corporation possesses only such powers as are granted to it. This is modified to the extent that all powers which are necessary to the enjoyment of the rights and privileges granted are included in the grant of powers. This is upon the theory that it is essential that the corporation shall have the right to carry out and enjoy the rights and privileges conferred upon it, so that any right or power which is essential to the enjoyment of the powers granted is implied. In *Smith & Crittenden v. Steele*, 8 Neb. 115, it is said: "But a corporation is a mere creature of the statute, and, being such, it possesses only those properties and powers which the charter of its creation confers upon it." In *State v. Atchison & N. R. Co.*, 24 Neb. 143, it is held: "The powers of a corporation organized under legislative statutes are

such, and such only, as the statute confers. The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others." And in the body of the opinion, at page 162, the following language, taken from *Thomas v. Railroad Co.*, 101 U. S. 71, is quoted with approval: "Conceding the rule applicable to all statutes that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." In *State v. Nebraska Distilling Co.*, 29 Neb. 700, it is said: "Unlawful acts of a corporation are not limited to those which are *mala prohibita* and *malum in se*, but include powers which the corporation is not authorized to exercise, and contracts which they are not empowered to make."

The law under which these companies were organized did not specifically grant the power or right to reinsure, but appellant contends that the right of reinsurance is essential and necessary to the transaction of the business authorized to be carried on, and, therefore, the right to transact a reinsurance business is included in the powers granted. By an examination of the provisions of our statute, it is disclosed that the legislature, in authorizing the organization of stock insurance companies, specifically granted the power to reinsure, while in the several acts authorizing the organization of mutual insurance companies no reference in any of them is made to the right to reinsure. No limitation of the amount of a risk which the stock insurance companies might write is contained in the statute authorizing their organization, while such provision does exist in the act under which the companies in question were organized. The greatest liability which they may incur upon a single risk is limited to $3,000, while under certain conditions the liability on a single risk is limited to $1,000. This would indicate that no limitation was placed upon the stock companies as to the amount of any risk, because they possessed the power to

reinsure, and thereby divide the risk that might to them appear excessive with other companies by reinsurance. But the legislature saw fit to determine what seemed to it a just limitation of the risks which a mutual insurance company might write. Section 6544, Ann. St. 1907, provides that any number of persons, not less than 100, residing in this state *who own* city or village, real or personal property, which they desire to have insured, may associate themselves together for mutual insurance. This would seem to imply that none but owners of property were entitled to become members of a mutual insurance company, and that no property might be insured except such as was owned by the members. Section 6546 requires that all persons who effect insurance in such companies shall become members thereof. All these provisions of the statute which we have referred to indicate that it was the purpose of the legislature to limit the business to be transacted by these mutual companies to the insurance of tangible property owned by their members.

At this point it seems proper to consider the nature of a contract of reinsurance. In *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 38, it is said: "Reinsurance * * * is a contract of indemnity, in which the insurer reinsures risks in another company, and is solely for the benefit of the latter, and not of the policy holders." In *Hunt v. New Hampshire F. U. Ass'n*, 68 N. H. 305, it is said: "By a contract of reinsurance, in whatever language expressed, the obligation of the reinsurer is to indemnify the insurer against his liability for the loss by fire of the property insured. They stand in a relation to each other much like that of principal and surety. The only material difference is that the reinsurer is not in law directly liable to the insured." In the case of *Goodrich & Hick's Appeal*, 109 Pa. St. 523, it is said: "'Reinsurance' is properly applied to an insurance effected by one underwriter with another, the latter wholly or partially indemnifying the former against the risks which he has

assumed; that is to say, after an insurance has been effected, the insurer may have the subject of insurance reinsured to him by some other." It is apparent, therefore, that the contract of reinsurance is not to insure the owner of the property against its loss by fire or other casualty, but is a contract to indemnify another insurance company or underwriter. Strictly speaking, it is purely a contract of indemnity, not against loss by fire or other hazard provided in the original policy, but against loss by or on account of the outstanding contract of insurance with the owner of the property. A contract of reinsurance is simply to indemnify the original insurer for a loss he may sustain upon his contract of insurance. It is a guaranty to reimburse him for any sum he may be compelled to pay under a contract of insurance with the owner. While it might be convenient, or even an advantage, to a mutual insurance company to possess the right to reinsure its risks that to it might seem excessive, or to reinsure a portion of its risks where it has too great a number in the same locality, and while we do not decide that this cannot be done in a company empowered to assume such risks, yet such right is not necessary to the transaction of the insurance business. It has the right to limit the amount of any one risk, or the number of risks, that may be offered to it to such an amount, or to such a number, as to it appears safe. But in no event can it go beyond the limitation placed upon it by the statute. For the reasons given, we are of the opinion that chapter 45, laws 1897, authorizing the organization of mutual insurance companies, was not intended to, and did not, confer upon them the right to transact a reinsurance business.

Appellant contends that the contracts of reinsurance were executed, and that the appellee is estopped from setting up the defense of *ultra vires*. In this we do not concur. The contracts were not executed, and this action is for the purpose of enforcing a liability upon the contracts. It follows from what has heretofore been said, that it was beyond the powers of these companies to write

reinsurance, and, where the contracts are beyond the powers of the companies to write, they are not estopped from pleading *ultra vires* as a defense. 22 Cyc. 1416, 1417. There are several other questions raised by the appeal, but it is unnecessary to discuss them, for the judgment rendered was the only one that could have been properly entered.

It follows that the judgment of the district court should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

PETER MOHR, APPELLANT, V. ANTONIA MOHR ET AL., APPELLEES.

FILED APRIL 23, 1908. No. 15,078.

1. **Divorce**: PROCEDURE. In the trial of a divorce case the court should exercise a sound legal discretion in matters of procedure as well as in the consideration of the evidence adduced, and in the exercise of such discretion may require such notice of its orders from time to time as are necessary to a full and open presentation of the case by both parties thereto.

2. ———: DECREE: CONCLUSIVENESS. Where a husband and wife, living in different states or jurisdictions, have each commenced against the other a suit for divorce, and in the first suit called for trial both parties appear in person and by attorneys, and, upon issues duly joined, litigate their disputes and grievances to a final decree in said suit, and the court enters a decree of absolute divorce, and said decree is not appealed from, the marriage relation theretofore existing between the parties is completely severed, and the unsuccessful party is without standing to proceed in the suit pending in said other state or jurisdiction.

3. ———: ———: SETTING ASIDE. And if said unsuccessful party proceeds in such other jurisdiction, and obtains a decree of divorce and judgment for alimony, without notice to the other party,

upon perjured evidence and without advising the court of such prior divorce, such action constitutes a fraud upon the court as well as upon the other party to the suit, for which a court of equity should set aside said decree and permit the defendant in such suit to appear and defend the same.

4. **Petition** examined, and *held* to state a good cause of action for equitable relief.

APPEAL from the district court for Hitchcock county: ROBERT C. ORR, JUDGE. *Reversed.*

George E. McConley and *Boyle & Eldred,* for appellant.

J. W. Cole, contra.

FAWCETT, C.

The defendant, Antonia Mohr, as plaintiff in an action in the district court for Hitchcock county, on an *ex parte* hearing, obtained a decree of divorce and a judgment for alimony against the plaintiff herein. Plaintiff thereupon brought this suit to set aside said decree on the ground that it had been obtained by fraud and perjury. Briefly stated, his petition alleges that on the 9th day of January, 1905, he commenced an action in the county court of Morgan county, Colorado, against the defendant to secure a divorce; that defendant was personally served with summons in said action, and filed an answer and cross-petition therein, in and by which she prayed for a divorce from the plaintiff and for alimony; that on the 9th day of April, 1906, a trial was duly had before said court, the same being a court having jurisdiction of such causes, and a jury, and, the jury having found the issues in favor of the plaintiff, a decree was by said court, on said date, entered in said action dissolving the marriage relation between the plaintiff and the defendant, and denying the defendant any relief for alimony; that on the 9th day of March, 1906, while the said action was pending in the county court of Morgan county, Colorado, the defendant commenced an action against the plaintiff in the district

court for Hitchcock county, Nebraska, for a divorce and for alimony; that the plaintiff, relying upon the decree so rendered by the Colorado court, and believing that the district court for Hitchcock county, Nebraska, could not and would not render any decree against him in the action there pending, without proof of the existence of the marriage relation between plaintiff and defendant, and believing and assuming that the defendant would not commit perjury therein nor wrongfully and falsely mislead and deceive the court in the trial of said cause, was not in attendance upon said court at the time of the rendition of the decree complained of, and did not know of the rendition of said decree until after the adjournment of the term at which said decree was rendered. The petition does not set forth what notice the plaintiff had of the pendency of the Hitchcock county suit, but it may be assumed that the service therein, if any, was a substituted service, for the reason that his residence was in the state of Colorado. It is alleged, however, in the petition that the plaintiff filed a special appearance in said action. It is further alleged that on the 16th day of April, 1906, the defendant caused plaintiff's special appearance to be overruled and default to be entered in said action against him; that she immediately proceeded to trial *ex parte,* and obtained the decree of divorce and the judgment for alimony complained of. It is further alleged that the defendant testified on the trial of said cause in Hitchcock county that the relation of husband and wife, at that time, still existed between herself and the plaintiff herein; that said Antonia Mohr well knew said testimony to be false, fraudulent and perjured; and a new trial was prayed for. A general demurrer was sustained to plaintiff's petition, and, he not desiring to amend, a judgment was rendered dismissing his action, from which judgment this appeal is prosecuted.

Plaintiff contends that the court erred in sustaining the demurrer to his petition, for the reason that the facts stated therein bring the case within the rule announced

in *Munro v. Callahan,* 55 Neb. 75. In that case we held: "Where it appears that the judgment depends for its support upon the (perjured) evidence of the successful party given at the trial, and that the defeated party has a valid defense which he was prevented from establishing by reason of such perjury, and where he has been guilty of no negligence and has exhausted all his ordinary legal remedies for obtaining a vacation of such judgment, then equity, in a proper proceeding, will vacate such judgment and grant the defeated party a new trial of the action." The petition alleges that the district court for Hitchcock county would not have rendered a decree of divorce and a judgment for alimony against the plaintiff if the defendant herein had not committed perjury by testifying that the relation of husband and wife then existed between the parties to said action; that by giving such testimony the defendant perpetrated a fraud upon the court, and by such perjury, fraud and deceit induced the court to render a judgment which it otherwise would not have pronounced. According to the well-established rules of equity, it was not only proper for the district court, but it was its duty, upon being advised by plaintiff's petition of the fraud and deceit that had been practiced by the successful party, to set aside the judgment thus obtained and award the plaintiff a new trial.

It is said by counsel for the defendant that plaintiff was guilty of laches in not pleading the judgment of the Colorado court in bar to defendant's action, and that, because of such neglect, he is not entitled to any relief in the present suit. It seems to us that this contention is not well founded. When the plaintiff was advised of the commencement of the defendant's action in Hitchcock county, he, for some alleged defect in the service, which is not fully disclosed by the record before us, filed a special appearance objecting to the jurisdiction of the court. The defendant, having joined issue with him in his action which was then pending in a court of competent jurisdiction in the state of Colorado, and having proceeded to a trial

upon the merits of said action, was bound by the judgment entered therein, and, so far as appears, she led him to believe that she acquiesced in such judgment, for no appeal therefrom was ever prosecuted by her. We think, therefore, that plaintiff had a right to rely upon his belief that the Colorado judgment settled all of the matters in controversy, and that no further proceedings would be taken by defendant in the district court for Hitchcock county. The defendant, however, without giving him any notice of her intention to further press that suit, hastened to Hitchcock county, and induced the district court to overrule plaintiff's special appearance and objections to its jurisdiction, had his default entered therein, immediately proceeded to trial, and, by the perjury and fraud alleged and set forth in the plaintiff's petition, obtained the decree, which is here complained of. It would seem that, having overruled the plaintiff's objections to its jurisdiction, the district court for Hitchcock county should have allowed a reasonable time to answer the petition in that action, and notice should have been given him, so that he might have made his defense thereto. This not having been done, it is apparent that plaintiff never had any reasonable opportunity to plead the decree of the Colorado court as a bar to the defendant's action. In our opinion, therefore, plaintiff has not been guilty of such laches or negligence as renders it necessary to deny him the relief prayed for in this action. Judgments obtained in the manner and by the means resorted to by the defendant in this action should not be allowed to stand; especially so in divorce proceedings, where not only the rights of the parties, but the right of the state, which is committed to the policy of the preservation of the marriage relation and the denial of divorces unless granted upon due notice and substantial grounds, are involved. We think that this case should be ruled by *Munro v. Callahan, supra;* that the allegations of the plaintiff's petition are sufficient to entitle him to the relief prayed for; and that the demurrer thereto should have been overruled.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in harmony therewith.

REVERSED.

MATILDA STRUBBLE, APPELLEE, V. VILLAGE OF DEWITT, APPELLANT.

FILED APRIL 23, 1908. No. 15,098.

1. **Cities: SIDEWALKS: LIABILITY.** A city or village is not required to have its sidewalks so constructed and kept in repair as to secure absolute immunity to persons using them; nor is it bound to employ the utmost care and exertion to that end. Its duty under the law is only to use reasonable diligence to keep its sidewalks in a reasonably safe condition for the use of persons passing over them, exercising ordinary care and caution.

2. **Trial: INSTRUCTIONS.** When instructions are asked by either party to a suit, which correctly state the law upon the issues presented by the pleadings and the evidence received during the trial, it is error to refuse them, unless the points are fairly covered by other instructions given by the court on its own motion.

APPEAL from the district court for Saline county: LESLIE G. HURD, JUDGE. *Reversed.*

B. V. Kohout and *R. D. Brown,* for appellant.

Bartos & Bartos and *Hall, Woods & Pound, contra.*

FAWCETT, C.

Defendant brought her action in the district court for Saline county, Nebraska, to recover for personal injuries alleged to have been sustained by her on the 8th day of September, 1903, from a fall on an alleged defective side-

walk in the defendant village. The jury returned a verdict in favor of the plaintiff for $300. A motion for a new trial was overruled and judgment entered on the verdict, from which judgment this appeal is prosecuted. As the case must be reversed for errors in the instructions, we will not consider the other questions discussed.

The defendant tendered three instructions, which were all refused by the court. As instruction No. 1 is, in our judgment, fully covered by instruction No. 2, given by the court, it need not be set out in full. Instructions 2 and 3, requested by defendant, were as follows: "(2) The defendant is not required to have the sidewalk so constructed as to secure absolute immunity in using them, nor is it bound to employ the utmost care and exertion to that end. Its duty under the law is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and caution. (3) The burden of proving negligence rests upon the party alleging it, and, where a party charges negligence on the part of another as a cause of action, she must prove the negligence by a preponderance of evidence; and in this case, if the jury find that the weight of evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover, and the jury should find the issues for the defendant." The court refused both instructions. No contention is made by plaintiff's counsel that these two instructions do not correctly state the law. They rest upon the statement in their brief that the instructions requested by defendant "were fully covered by instructions numbered 2, 3, 4, and 6 given by the court on its own motion." An examination of the four instructions referred to will show that they do not even attempt to instruct the jury upon the points requested. The two instructions requested by defendant correctly stated the law, were in point, and should have been given. *City of Lincoln v. Gillilan*, 18 Neb. 114; *City of York v. Spellman*, 19 Neb. 357, 384; *City of Lincoln v. Smith*, 28 Neb. 762, 781. If the court regarded them as defective in form, it should have treated them as requests

for instructions on the points designated, and have properly instructed the jury upon the points requested.

In instruction No. 2, given by the court on its own motion, the jury were told: "In order to recover the plaintiff must establish by a fair preponderance of the evidence that the walk described in the petition was at the time complained of in a defective condition, and by reason of the defects unsafe for persons to pass over, using ordinary care and prudence; that in passing over this walk the plaintiff, while using ordinary care and prudence, and by reason of the defect in the walk, fell and sustained the injuries, or some of them, complained of in her petition; that the defective and dangerous condition of the walk was known to the village through the knowledge of some of its officers, members of the town board, or street commissioner, or that the defective and dangerous condition of the walk had existed for such time that the officers should, in the performance of their duty, have known thereof, which is not any fixed or definite time established by law, but such time as you find as reasonable men, under the evidence and circumstances of the case, would raise a reasonable presumption that they would have known it; that the unsafe condition of the sidewalk upon which the plaintiff fell and received her injuries was the result of the negligence of the officers of the defendant village in failing to repair the same, or see that it was kept in such repair as to be safe for foot passengers." This instruction is complained of by defendant, and justly so. The closing paragraph of the instruction tells the jury that it was the duty of the officers of the defendant to repair the sidewalk, or see that it was kept in such repair as to be safe for foot passengers. This was requiring more than the law demands. All that the officers of the defendant were required to do was to use reasonable diligence to keep the walk in a reasonably safe condition for use by persons passing over it, using ordinary care and prudence. To require them to see that "it was kept in such repair as to be

safe" would be to make the village an insurer of the safety of persons passing over its sidewalks.

For the errors above indicated, we recommend that the judgment of the district court be reversed.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

HENRY JONES, APPELLANT, V. E. L. KELLY, TRUSTEE, ET AL., APPELLEES.

FILED APRIL 23, 1908. No. 15,156.

Deeds: CANCELLATION: DURESS. Evidence examined, substance of it set forth in the opinion, and *held* sufficient to sustain the findings and judgment of the district court.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

John M. Macfarland and *B. S. Baker,* for appellant.

C. C. Wright, W. B. Kelly and *B. H. Dunham, contra.*

FAWCETT, C.

Plaintiff brought suit in the district court for Douglas county against E. L. Kelly, trustee of the Reorganized Church of Jesus Christ of Latter Day Saints, E. L. Kelly, and the Reorganized Church of Jesus Christ of Latter Day Saints, to set aside a deed to the north one-half of lot 11, block 12, in E. V. Smith's addition to the city of Omaha, executed and delivered by him April 9, 1899, to defendant E. L. Kelly, trustee of the church, and his successors in office, for the use and benefit of said church. Plaintiff based his right to have the deed vacated upon

two grounds: (1) That at the time of the execution of the deed, plaintiff was *non compos mentis* and unable to transact business; (2) that the deed was procured by fraudulent representations and by duress. After a full hearing the district court found all of the issues in favor of the defendants, and dismissed plaintiff's suit, with costs.

It will be observed that no propositions of law are involved, but that the case turns entirely upon questions of fact. We have read the entire record, and the evidence so overwhelmingly preponderates in favor of the finding made by the district court that it would be a waste of time and space to set it out in this opinion. The evidence clearly establishes the following facts: Plaintiff, at the time of the execution of the deed in controversy, had no children of his own. His wife had a son by a former husband, who was married and had a family. Some time prior to the execution of the deed this son and his family moved to Omaha. They had not been in Omaha very long until the stepson and his mother, plaintiff's wife, began to importune plaintiff to make a deed of all of his property to the stepson; the stepson to support the old couple as long as they lived. After consultation with his friends plaintiff declined to make such a deed. His wife and stepson continued to annoy him about the matter until the trouble became serious. Plaintiff, who, it would seem, was a devout member of the defendant church, declined to employ an Omaha lawyer, when advised so to do by one of his friends, stating that he would send for Mr. Kelly, defendant herein, bishop of his church, in whom he appeared to have great confidence, and who, it also appears, had been at one time a lawyer of more or less prominence in the state of Iowa. Mr. Kelly was sent for. When he arrived upon the scene a deed had already been made out to the stepson for one house and lot. The deed was an unconditional warranty deed. At the time of examining the deed they told Mr. Kelly that the stepson was to pay plaintiff and his wife $5 a month as long as they lived. Upon the advice of Mr. Kelly, he (Kelly) inserted a reservation of

that kind in the deed before it was signed and acknowledged, thus protecting plaintiff's rights as against the stepson. Plaintiff then proposed to deed the property in controversy here to the church. Mr. Kelly declined to receive this donation until he could talk the matter over with the plaintiff's wife. After having a conversation with her, and she being of the same mind as her husband, Mr. Kelly prepared the deed, inserting in it this clause: "The said Henry and Jane Jones reserving for themselves the rents and profits of the said described premises during their natural lives or so long as either shall live." At the same time, and at the request of plaintiff, Mr. Kelly prepared a third deed to a niece of plaintiff for another piece of property, in which deed he inserted the same reservation as to the rents and profits during the lives of the grantors. Before Mr. Kelly left the city at that time plaintiff showed him a certificate of deposit for $500 in an Omaha savings bank, then in process of liquidation, upon which he, plaintiff, had been unable to obtain any money. Mr. Kelly took charge of the certificate for him, and finally succeeded in obtaining a draft for the amount. At the time plaintiff executed the deed in controversy he and Mr. Kelly discussed the matter as to how the donation should be credited, and it was finally decided, on plaintiff's suggestion, that one-half of it be credited generally on the church account, and the other one-half on account of an Old People's Home which was being maintained by the church at Lamoni, Iowa; plaintiff stating at the time that, if he made the donation in that way, then, if he should ever have to go to the home, he would feel that he had paid his way. Not very long after executing the deeds plaintiff went to the home at Lamoni, where he remained for about six months. During the time he was there his wife died. After remaining in the home for about six months he left it and returned to Omaha. During the time he was in the home a Mr. Huff, a deacon in the church, collected his rents. When he decided to leave the home he called upon the defendant Kelly for the draft which Mr.

Kelly had obtained for his deposit in the defunct savings bank, which draft Mr. Kelly promptly delivered to him, reserving nothing whatever for his trouble and services in the matter. On his return to Omaha he called upon Mr. Huff, for a settlement of the rents during the time he had been away, which settlement Mr. Huff promptly made, turning over to him all moneys in his hands. Some time after that the plaintiff, then over 80 years of age, married an old lady who had been an inmate of the home at Lamoni during the time he was there. Through her instigation he got his draft cashed. Out of the proceeds of the draft he kept $200, and gave her the remainder. Trouble soon arose between them, and they separated. Later on, application was made to the county court of Douglas county for the appointment of a guardian for plaintiff, and such appointment was made. This suit is being prosecuted by the guardian.

It will be seen from the above statements that up to this time the church has never received a cent of money from plaintiff, nor any benefit whatever from the property conveyed to it. Plaintiff is still entitled to receive, and his guardian doubtless is receiving, the rents and profits of the property conveyed to the defendants, and of the property conveyed to the niece, and $5 a month for the property conveyed to the stepson, who is now deceased. In addition to all this, plaintiff has a right, at any time he sees fit, to go to the home at Lamoni, Iowa, and remain there the rest of his days. The old gentleman himself testified when on the witness stand that the home is a nice home, well kept, everything clean, and every kindness shown. The only objection which he seems to have had to the home was that he was not entirely satisfied with the board. But whether the home is a satisfactory place or not is immaterial. He has the entire income from all of his property, just as he had before the deeds were executed. He has parted with nothing except the right to sell or incumber the property, a right which, in our judgment, he was very fortunate in having surrendered by the

deeds above referred to. The evidence falls far short of establishing such a weakness of mind as would entitle plaintiff to have the deed set aside on that ground, and there is no testimony in the record, rising to the dignity of evidence, that defendant Kelly, or any of the officials of the defendant church, ever attempted, by duress or otherwise, to influence plaintiff in the slightest degree. That the stepson and his mother made trouble for the old gentleman is undoubtedly true; but they are not before us, and defendants were in no manner responsible for their reprehensible conduct. Without pursuing the matter further it is sufficient to say that the conclusion reached by the court was the only one possible under the evidence.

The judgment of the district court is right, and should be affirmed.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

COOPER & COLE BROTHERS, APPELLANT, V. GEORGE P. WHITHAM ET AL., APPELLEES.

FILED APRIL 23, 1908. No. 15,175.

Pleading: CONSTRUCTION. Petition set out in the opinion examined, and *held* to state a cause of action only for goods and merchandise sold and delivered.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

Walter J. Lamb and *F. B. Sidles,* for appellant.

Charles H. Epperson and *George E. Hager, contra.*

FAWCETT, C.

The petition alleges: "The plaintiff complains of the defendant, and for cause of action shows that at all times

herein mentioned the plaintiff has been and is a corporation duly organized and incorporated under the laws of Nebraska, and that the defendants George P. Whitham and J. E. Wilkins have been and are a copartnership doing business under the style and firm name of Whitham & Wilkins; and the plaintiff further shows that on the 1st day of January, 1906, the said defendants were indebted unto this plaintiff in the sum of $882.64 for a balance of an account for goods and merchandise before that time by the plaintiff sold and delivered to the said defendants at their instance and request, which said sum and balance was on said 1st day of .....due and unpaid, with interest thereon from said last named date. A copy of the said account is hereto attached, with all payments and credits thereon. Wherefore plaintiff demands judgment against said defendants for the sum of $882.64, with 7 per cent. interest thereon from January 1, 1906." The answer is a general denial.

In their brief counsel for plaintiff argue at length and cite authorities in support of their second assignment—that the court erred in overruling their objections to a large number of questions and answers offered by defendants and received by the court. The theory upon which they claim that this line of proof should not have been received is that plaintiff is entitled to recover on an account stated, and that defendants could not introduce the testimony objected to, under their general denial. If plaintiff had declared on an account stated, counsels' contention would be well grounded; but the petition does not tender that issue. We cannot, therefore, follow plaintiff into this field, and consider either its assignments of error or authorities on the theory of an account stated. Nor do we think that the question as to what acts of an agent will bind his principal, or as to what constitutes ratification by a principal of the unauthorized acts of its agent, has any place in the consideration of this case. The one simple question tendered by the pleadings is: Did plaintiff sell the goods and merchandise in controversy

to the defendants? No question of agency, estoppel or ratification is in any manner raised by the pleadings; hence, the only question in the case is one of fact.

It appears that plaintiffs are wholesale dealers, among other things, in steam heating and plumbers' supplies. The transactions between the parties, so far as the record discloses, opened on May 20, 1905, when defendants addressed to plaintiff this letter: "Fairfield, Neb., May 20, 1905. Cooper & Cole Bros., Lincoln, Neb. Gentlemen: The time is about ripe to get hold of some business in bath outfits. We have a number of good prospects. Have your salesman G. G. W. make it a point to get around here soon. Yours truly, Whitham & Wilkins." Indorsed on this letter with pencil we find: "Wrote Williams 5-22 to call on these parties." "G. G. W." seems to have been a traveling salesman of the plaintiff, with whom defendants had had a prior conversation, the nature of which defendants were not permitted to show. Shortly after defendants mailed that letter one Gilbert Cooper, a son of the Mr. Cooper of Cooper & Cole Bothers, appeared at defendants' store in Fairfield and introduced himself to defendants, stating, as testified to by defendant Whitham, that "he was the party who went around over the state of Nebraska and took contracts for these air pressure systems, and overseen them and superintended the work while it was in progress"; that what he desired the defendants to do was to give him the names of parties whom they knew, or heard of, wanting such systems; that if he succeeded in entering into contracts with any of the parties there he would want defendants to receive and distribute the material, to advance the money to pay the freight on the goods, and also to pay the workmen who would be employed on the jobs, and that he would give them a certain agreed compensation; that they were to collect the moneys, and out of the moneys collected were to reimburse themselves for their advancements and their agreed compensation, and turn

the balance over to him; and that they agreed to this arrangement. The testimony by defendants shows that after making the above arrangement with Mr. Cooper they introduced him to a number of citizens of Fairfield, whom they thought might desire the installation of water or heating systems. Mr. Cooper then actively began the work in hand and prosecuted it so successfully that he made oral contracts for the installation of either water or heating plants, in some instances both, in five different houses in Fairfield. The gentlemen to whom he made these sales were introduced as witnesses, and all testified unqualifiedly that they conducted their negotiations and made their agreements with Cooper alone; that defendants took no part in the negotiations, and had nothing to do with the making of the agreements; that they were told by Cooper, after the work had progressed to that stage where payment should be made, to make their payments to Whitham & Wilkins. One of the gentlemen testifies that he understood that Whitham & Wilkins were getting a rake-off; but they all testified that Cooper conducted the negotiations, closed the contracts, and that he (Cooper) personally supervised and directed the work of installing the plants. The evidence also shows, without contradiction, that the plumbers, and even the helpers, were sent to Fairfield either by the plaintiff or by Cooper. In two instances it is shown by plaintiff's own witnesses that the men were sent there by Mr. Cooper, Sr. The defendants themselves both testify that they had nothing to do with the making of the contracts; that they did not participate in the negotiations; that they had nothing whatever to do with supervising the work of installing the plants; that all they did was to receive the stuff when it arrived, see that it was sent to the places where it should go, and receive and remit the moneys paid by the parties. This testimony on the part of defendants and their witnesses is contradicted by Cooper and by one of the plumbers, a colored man named Harris, whom the elder Cooper sent to Fairfield to do the work.

Harris testified that when Mr. Cooper, Sr., sent him to Fairfield he told him that some parties to whom they were selling goods wanted a man, and that he was sending him there for them. It is significant, however, that at the time Harris was selected to go to Fairfield to engage in this work he then was, or immediately prior thereto had been, engaged in similar work for either the plaintiff or Gilbert Cooper at Fairmont, and, further, that when Harris arrived at Fairfield it was in company with Gilbert Cooper and a helper who also had worked at Fairmont with Harris.

Under the issues as tendered by the pleadings, we think all of the testimony objected to by plaintiff and relied upon in their assignments of error here was proper, and that the court did not err in admitting it. Plaintiff places great reliance upon the fact that, when the goods were shipped from time to time to the defendants, plaintiff mailed defendants invoices of the goods which upon their face indicated that the goods were being sold to defendants, and, further, that from time to time defendants sent to plaintiff written orders for specific articles to be used in work under way. Defendants both testify that the orders they sent in from time to time were under instructions from Mr. Cooper, who told them that whenever the men advised them that anything was needed for them to order it, and that they never, in any case, ordered anything from the house, except when the plumber engaged upon the work would come and advise them of the fact that such articles were needed. They also both testify that, when they received the first of these invoices indicating that the house was not only shipping the goods, but billing them, to them, they spoke to Cooper about it, and Cooper told them that that was merely a matter of form with the house in keeping their accounts; that they need pay no attention to them; that everything was all right, just as they had arranged. On one or two occasions, when defendants were called upon by plaintiff for remittances, they spoke to Cooper about it. He told

them they need not pay any attention to them; that they did not have to pay the money until the collections were made as they had agreed. Defendants acted upon these statements, and nothing seems to have been done by plaintiff to enforce the request for remittances until after the work was substantially all completed, when they sent Cooper and an attorney to Fairfield to obtain a settlement from defendants. Defendants expressed a perfect willingness to make the settlement on the terms of the agreement which they claimed to have made, viz., by deducting from the moneys which they had collected, the amount of their advancements and compensation. This proposition was not accepted by Cooper and the attorney, so they (Cooper and the attorney) gathered up all of the material that had been left at places where the work had been done and shipped it to plaintiff at Lincoln. Shortly afterwards this action was begun.

We have examined the instructions given by the court, and find that they fairly submitted to the jury the question, and the only question for their consideration, viz., whether the plaintiff had sold and delivered the goods and merchandise in controversy to the defendants. The jury, upon the conflicting evidence to which we have referred, found in favor of defendants, and returned their verdict accordingly. Judgment was entered upon that verdict, and, regardless of how we might have determined the weight of the evidence upon the record now before us if the matter were before us as an original proposition, we cannot say that the verdict is not sustained by the evidence.

Finding no error in the record, we recommend that the judgment of the district court be affirmed.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FRANK W. BARBER, APPELLEE, V. STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, APPELLANT.

FILED APRIL 23, 1908. No. 15,162.

1. Contracts: ALTERATIONS: PRESUMPTIONS. Where a contract prepared by the use of a typewriter appears to have been changed after the first impression is made, the presumption is that such change was made before execution and delivery.
2. Corporations: CONTRACTS: AUTHORITY OF MANAGER. The manager of sales of a manufacturing corporation has power to direct and contract in regard to the usual running business of selling its wares, and persons contracting with such corporation are not bound to know of a by-law thereof limiting the power of such manager to make the customary contracts.
3. ———: ———: RATIFICATION. Where a corporation ratifies or knowingly accepts the benefits of a contract made by one of its agents, it cannot repudiate the same on the ground that the agent had no actual authority to execute such contract.

APPEAL from the district court for Franklin county: ED L. ADAMS, JUDGE. *Affirmed.*

Dorsey & McGrew, for appellant.

Flansburg & Williams, contra.

CALKINS, C.

The plaintiff brought action in the court below, alleging default in the performance of a contract in the words and figures following: "Memorandum of agreement made this 17th day of August, A. D. 1903, by and between Mr. F. W. Barber, of Franklin, Neb., party of the first part, and Stromberg-Carlson Telephone Manufacturing Company, party of the second part, witnesseth: The party of the first part shall use his best efforts and in fact secure for the party of the second part the contract for the central office apparatus and telephones for the Home Telephone Co., of Grand Island, Neb., said telephone exchange to be built by Mr. J. F. Butterfield of the city of Chicago;

the price of said apparatus to be not less than $8,474.10, or the same as those specified under specifications submitted to Mr. J. F. Butterfield, of the city of Chicago, under date of August 10, '03. For and in consideration of the services rendered, the party of the second part hereby agrees to pay the party of the first part the sum of $625, less advances made by the party of the second part of $125, which said party of the first part agrees to pay to the party of the second part when the contract shall have been settled. It is understood and agreed by and between the parties hereto that this consideration shall be paid when the apparatus shall have been paid for either by the purchasing company or the contractor. It is further agreed by the parties hereto that said party of the second part has advanced the sum of $436 as expenses for the securing of the franchise in the city of Holdrege, Neb., and that, whereas the party of the first part is part owner of the franchise in the city of Holdrege for the construction and operation of a telephone exchange, and whereas said party of the first part is in negotiation with one J. F. Butterfield to dispose of said plant, it is hereby mutually agreed that, when said Butterfield shall have paid either to said party of the second part or the party of the first part the sum of $636, the valuation as placed upon the expenses as estimated as incurred in the securing of said franchise in the city of Holdrege, Neb., then said party of the second part shall pay to said party of the first part $200 of said expenses. It is further agreed verbally under this date that all agreements for commissions on Orleans, Alma, Bloomington and Riverton still remaining unpaid under the agreement of Nov. 10, '02, shall be computed up to August 15, and no further commissions shall be paid for extensions or additions to the above properties, and shall terminate the arrangement as of Nov. 10, '02. It is understood and agreed that the Reamsville matter shall also be covered by the agreement of Nov. 10, and shall terminate on the completion of the original contract. It is agreed that on future busi-

ness a separate agreement shall be made covering each individual case. In witness whereof the parties hereto have caused their seals and signatures to be attached this 17th day of August, A. D. 1903. (Seal.) F. W. Barber. (Seal.) Stromberg-Carlson Tel. Mfg. Co., by G. W. Stiger." The answer was a general denial, and upon the trial to the court there was a general finding and judgment for the plaintiff, from which the defendant appeals.

1. At the trial the defendant produced a paper, which appeared to be a carbon impression of the draft for the contract in question. It bore the signatures of both the plaintiff and Mr. Stiger. If the carbon impression produced by defendant was in fact made, as it appears to have been, by the same impression of the types as the ribbon copy produced by plaintiff, then the latter had been, after the duplicate impression had been made by the typewriter, altered by striking out the words, "G. W. Stiger of the," in the caption of the contract, and by inserting with the typewriter over the signature of Mr. Stiger the words, "Stromberg-Carlson Telephone Mfg. Co., by." The originals of these papers are attached to the record, from which it appears that, while both bear the genuine signatures of the plaintiff and Mr. Stiger, such signatures are not duplicates. The names of both the plaintiff and Mr. Stiger appear to be signed to the ribbon impression with a fine-pointed pen and with what presents the appearance of a grayish black ink, while the plaintiff's signature upon the carbon impression seems to have been made with a much coarser pen and blacker ink, and Mr. Stiger's signature to the latter was with a blue pencil. The plaintiff was called as a witness, and testifies that the ribbon copy is in the same condition as it was when delivered to him, but does not explain how the difference in the two copies occurred, nor the circumstances under which he signed the carbon impression. Stiger was not called as a witness, and the proof of the circumstances attending the signing of these papers rests, so far as oral testimony is concerned, upon the tes-

timony of the plaintiff. Upon these facts the defendant insists that the plaintiff and Stiger made the contract in question as individuals, and that the latter did not assume to act for the telephone company or on its behalf. The defendant's theory is that the physical evidence of the papers produced is sufficient to show that the difference between the ribbon and the carbon copy is owing to alterations made after its execution and delivery. Conceding that this would be the case if the signatures were in duplicate, or even if they appeared to have been attached at one and the same time, we think the difference in the signatures actually shown destroys any presumption that might otherwise exist that they were executed at one and the same time, and consequently any presumption that the ribbon copy was altered after it was executed. The physical evidence of the papers does show that the ribbon copy was changed after the duplicate impression was made by the typewriter; but it does not show, nor tend to show, that such changes were made after the signatures were attached and the papers delivered. The presumption of the law is that the changes were made before the execution and delivery of the papers. *Dorsey v. Conrad,* 49 Neb. 443. While the evidence of the plaintiff tends to support this presumption, there is no evidence whatever to overcome it.

2. The defendant further insists that, if Mr. Stiger did in fact assume to act for and make the contract in question in the name of the defendant, it was beyond the actual and apparent scope of his authority. Mr. Stiger was the defendant's manager of sales. We are not cited to any judicial definition of the authority of a manager of sales of a manufacturing corporation; but, since at common law the general manager of a corporation has power to direct and contract in regard to the usual running business of the corporation (2 Cook, Corporations (5th ed.), sec. 719), it would be fair to say that a manager of sales would have power to direct and contract in regard to the usual running business of selling its wares. In this

case the vital question is: Did the manager of sales have real or apparent authority to agree to pay commissions on orders for goods? To show his want of actual authority the defendant corporation introduced in evidence its by-laws, which provided that the president should execute all contracts, when authorized so to do by its board of directors, and that the treasurer should appoint and discharge all agents and employees, subject to the approval of the board of directors, and have the general management of its affairs. The rule that, where the charter provides that a corporate contract shall be signed by certain officers, instruments not so signed are unenforceable, is so harsh and inconvenient that it has been widely departed from and practically abandoned. 2 Cook, Corporations (5th ed.), sec. 725. Persons contracting with corporations are not bound to know of a by-law limiting the power of the agent to make the customary contracts appertaining to the business he is authorized to transact. 2 Cook, Corporations (5th ed.), sec. 725. The treasurer of the defendant was called, and testified concerning the contract in question: "I state that G. W. Stiger was not authorized to sign or execute any such contract." It is to be observed he did not deny that Stiger had authority to make the kind of agreement embodied in the contract, or, what would have been still more to the point, that Stiger had no authority to agree to pay commissions on orders for goods. The denial of Stiger's authority is directed to his competency to sign and execute this written contract, and may be simply the witness' construction of the law under the by-laws referred to. We think this testimony is not a denial of Mr. Stiger's authority to agree to pay to the plaintiff a commission in case he made the sale referred to in the contract. It further appears that Stiger had on several occasions made similar agreements to pay commissions on sales made by the plaintiff of the defendant's goods, and that defendant had from time to time paid such commissions.

3. There is evidence in the record sufficient to sustain

a finding that the defendant knew of the contract in the form that it appears upon the carbon impression in November, 1903, and before the closing of the Grand Island sale. The plaintiff produced a voucher for $200 "as portion of expenses incurred at Holdrege as per portion of agreement attached," and to this voucher is attached a typewritten copy of that part of the contract in question relating to expenses for securing the franchise in the city of Holdrege. The plaintiff testifies that he received these papers from the defendant's Rochester office, accompanied by a draft for $200 to his order, which draft was paid. If this is correct, then these papers must have passed through the defendant's auditing department, and it is hardly to be supposed that the voucher depending upon the contract, an extract from which was attached, would have been approved without any knowledge of the contract from which the extract purported to be taken. If the defendant ratified or knowingly accepted the benefits of the contract, it cannot now repudiate the same. *Brong v. Spence*, 56 Neb. 638; *United States School-Furniture Co. v. School District*, 56 Neb. 645.

In any view of the case, we think the decision of the trial court was fully supported by the evidence, and therefore recommend that its judgment be affirmed.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CARL JENSEN ET AL., APPELLEES, V. PALATINE INSURANCE COMPANY, APPELLANT.

FILED APRIL 23, 1908. No. 15,174.

1. **Contracts**: FORFEITURE: CONSTRUCTION. A clause stipulating for the forfeiture of a contract should not be aided or given effect by construction in a case where the plain meaning of the language used does not require it.

2. **Insurance**: FORFEITURE: WAIVER. A stipulation for the forfeiture of an insurance policy is waived by conduct of the insurer inconsistent with his right or intention to claim such forfeiture.

3. **Evidence**: OPINIONS OF WITNESSES: VALUE OF GOODS. Where the value of a stock of merchandise is a relevant fact, and no more accurate evidence is under the circumstances obtainable, the owner of such stock and witnesses acquainted with the value of the different articles of which it is composed, and who have observed the same for the purpose of estimating the value thereof, may give their opinion of such value.

4. **Insurance**: FALSE STATEMENTS: FORFEITURE. Where the value of the goods destroyed is greater than the amount of insurance thereon, such value is immaterial to the risk, and the making by the assured, after loss, of an affidavit in which the value is overstated will not constitute a defense to the action upon the policy under a clause providing that the same shall be forfeited in case of any fraud or false swearing by the assured touching any matter relating to the insurance either before or after loss. *Springfield Fire & Marine Ins. Co. v. Winn*, 27 Neb. 649, followed.

5. ———: EXAMINATION OF INSURED: WAIVER. The provision of an insurance policy that the assured shall, in case of loss, submit to an examination under oath by any person named by the insurer, is waived by a denial of all liability under the policy and a failure to demand such examination until long after the commencement of the action on the policy.

6. ———: PROOF OF LOSS: WAIVER: INTEREST. The provision in a policy of fire insurance that the policy is payable 60 days after due notice and satisfactory proofs of loss are made by the assured and received by the insurer is waived by such action of the insurer as waives proof of loss, and in such case interest should be computed from the date of loss. *Hartford Fire Ins. Co. v. Landfare*, 63 Neb. 559, followed.

APPEAL from the district court for Boone county: JAMES R. HANNA, JUDGE. *Affirmed.*

Greene, Breckenridge & Matters, for appellant.

Charles B. Keller and *M. W. McGan, contra.*

CALKINS, C.

The plaintiffs were proprietors of a general store at Bradish, a postoffice in Boone county, near Albion; their store being the only business house at that place. They were carrying insurance against loss by fire in the sum of $2,000, and on the 25th day of November, 1904, the defendant wrote its policy in the additional sum of $3,000 for the time of one year from said day, and on the 17th day of January, 1905, the store was destroyed by fire, only about $500 worth of goods being saved. The plaintiffs had no recent inventory, and the books and papers were destroyed in the fire. On the 1st day of February, 1905, the defendant's adjuster arrived, and, after the signing by one of the plaintiffs and the adjuster of what is called by counsel a nonwaiver agreement, interrogated the plaintiff Jensen as to the amount of his sales for the three years last preceding. The estimates of such sales, as made by Jensen, were put in the form of an affidavit, and the adjuster then requested, or at least suggested, that Jensen secure duplicate invoices, which he undertook to do, and employed an attorney to conduct a correspondence to that end. After writing numerous letters, but failing to hear from all the firms who had sold plaintiffs goods, and the amount of the goods shown by the duplicate bills actually obtained being considerably less than the estimate of Jensen, the attorney so employed by plaintiffs submitted the result of his labors to defendant's adjuster, who afterwards, on the 9th day of March, 1905, addressed to plaintiffs a letter notifying them that the defendant denied any and all liability under its said

policy. This action was commenced April 11, 1905, and a trial was had in October, 1906, resulting in a verdict for plaintiffs. Upon this verdict a judgment was afterwards rendered, from which defendant appeals.

1. There was attached to and made a part of the policy what is denominated "the iron-safe clause," which was in the words following: "Books and inventory to be kept, or insurance void. It is a continuing warranty on the part of the assured that an itemized inventory of the stock herein specified shall be taken at least once each year, and books of account showing all purchases and daily sales separately for cash and credit shall be kept, and said inventory and books of account shall be kept securely locked in a fire-proof safe within the building herein specified during the hours the building is closed for business, or said books and inventory, or itemized copy thereof, shall be kept securely locked up in a place (other than in said building), secured from being destroyed with the property herein specified. The failure to perform any of these conditions of insurance shall render this policy void. And it is hereby understood and agreed that no agent of this company shall have power to waive any of the foregoing conditions or warranties, except the same shall be in writing hereon or attached hereto." The plaintiffs had taken no inventory, and had no fire-proof safe. Their books of account, which seemed to have been kept in their store building, were destroyed by the fire. The fire did not, however, occur when the store was closed, and when the books were, by the clause above quoted, required to be locked in a fire-proof safe. It was contended by the defendant that the failure to take an inventory and keep it locked in an iron safe in the building was a breach of one of the conditions contained in this clause, which forfeited the plaintiffs' right to recover upon the policy. Upon this question the trial court instructed the jury that the plaintiffs had one year from the time the policy was issued to make the inventory. This, we think, was correct. If a party on a given

date stipulates to perform a specified act at least once in each year, and no date is fixed for its first performance, he cannot be said to be in default at any time before the end of that period. *Continental Ins. Co. v. Waugh & Son*, 60 Neb. 348; *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338; *Citizens Ins. Co. v. Sprague*, 8 Ind. App. 275. It is urged that under such interpretation the stipulation is valueless, because it makes it unnecessary for the assured to do what they had agreed until the expiration of their policy, but such is the plain meaning of the language, and we are not permitted to construe it otherwise, especially when the result would be to enforce a forfeiture. If the defendant is entitled to a forfeiture of the policy, it is because it is so denominated in the contract, and a clause calling for such forfeiture should not be aided or given effect by construction in a case where the plain meaning of the language used does not require it. *Continental Fire Ins. Co. v. Jeary, supra.*

2. It is contended by defendant that that part of the iron-safe clause which requires the books to be kept in the safe when the store is closed is independent of the clause requiring the inventory, and that, by plaintiffs' failure to so keep such books in such safe before the inventory was taken, their right to recover under the policy was forfeited. On the other hand, it is argued by plaintiffs that, since the only value, so far as the policy is concerned, such books of account could have would be to show the current increase and diminution of the stock, it was evident that their keeping should begin with the taking of the inventory, and that, therefore, there could be no default in the keeping of the books until an inventory which should furnish a starting point for them should be had, and this view is supported by the case of *Hanover Fire Ins. Co. v. Dole*, 20 Ind. App. 333. We do not find it necessary to determine this question. It appears that at the time of taking the policy defendant's recording agent, Mr. Brady, who wrote the risk, was fully apprised that the plaintiffs had no iron safe in their store, nor

safe place elsewhere in which to keep their books and papers, and for that reason Mr. Brady himself undertook to keep the policy for plaintiffs. Had Mr. Brady written such a policy himself as his own contract of insurance, and then undertaken to care for the policy because the assured had no place to protect it from fire, such act would have clearly been a waiver of the provision requiring the assured to keep his books in a fire-proof safe. When one in possession of any right secured by contract does something inconsistent with the existence of his right or with his intention to rely upon it, he is precluded from afterwards claiming anything by reason of it. Bishop, Contracts (2d ed.), sec. 792. This rule has by this court been often applied to contracts of insurance. *Billings v. German Ins. Co.*, 34 Neb. 502; *Home Fire Ins. Co. v. Phelps*, 51 Neb. 623; *Hartford Fire Ins. Co. v. Landfare*, 63 Neb. 559. In the case of a corporation, it is charged with notice of facts which were known at the time to its agent who had charge of the transaction. Cook, Corporations (5th ed.), sec. 727. This, too, has been by this court held to apply to notice received by recording agents of insurance companies while engaged in the business of their principal. *Eagle Fire Ins. Co. v. Globe Loan & Trust Co.*, 44 Neb. 380; *Home Fire Ins. Co. v. Bernstein*, 55 Neb. 260; *Hartford Fire Ins. Co. v. Landfare*, 63 Neb. 559. The court below took the view that, if these facts were true, they might constitute a waiver on the part of the defendant of this clause, and submitted the question to the jury on that theory. In so doing it committed no error of which the defendant can complain.

3. It is contended by the defendant that there was no competent proof of the value of the goods destroyed, and that, therefore, the verdict was not sustained by the evidence. The objections urged by the defendant seem to us to go to the weight of the testimony of the several witnesses, rather than to their competency. The plaintiff Jensen testified to the value of the goods. He had pur-

chased the same, they were in his personal charge, for a long time he had been selling from the stock at retail, and was undoubtedly competent to speak of the value of any particular article. In proving the value of personal property, it is usually held that the owner is allowed to estimate its value, whether he is qualified as an expert or not. 1 Wigmore, Evidence, sec. 716. In *Langdon v. Wintersteen,* 58 Neb. 278, complaint was made of the admission of the testimony of a witness as to the value of a stock of millinery goods; her only qualifications being that she had frequently priced and bought similar goods at retail, and knew their value in a general way. It was said by the court that this was sufficient; that the weight of her testimony was for the jury; and that no very precise or extended knowledge of values or articles in common use is essential to justify the trial court in admitting opinion evidence of this character. The three other witnesses who testified as to the value of this stock were traveling salesmen who frequently visited plaintiffs' store. One selling boots and shoes testified that he was there on December 23 or 24 last before the fire; that he was familiar with the value of the different kinds of goods carried in the stock; that it was part of his business to observe the amount and value of the stock on hand, and he was thereupon permitted to testify, and said that the value of the leather and rubber goods was not less than $3,000, and the whole stock not less than $8,000. A grocery salesman who had been selling such goods for 35 years, and making fortnightly visits to plaintiffs' store since 1903, testified that he was there the week before the fire, described the size of the store, the condition and the amount of the stock, and estimated the value of the class of goods sold by him at not less than $2,000, and the whole stock at $8,500. The remaining witness was a dry-goods salesman who had been visiting plaintiffs' store once in six weeks, and was sent there by his house December 15 to estimate the value of the stock. He had been in the dry-goods business for 26 years, and on this

visit went over the stock for the purpose of estimating the value of the same, and fixed that of the dry goods at $2,800; his estimate of the value of the whole stock being excluded by the trial judge. It seems clear to us that these witnesses were competent to give an opinion as to the value of the articles composing the stock; the real objection of the defendant being that they ought not to be allowed to estimate the quantity. Owners of stocks of goods are accustomed to form estimates of the value of a stock from a general inspection of its quantity and condition, and a comparison of its present appearance with its appearance at some former time when they had a more accurate knowledge of its amount and value. Commercial travelers are often charged by their employers with the duty of observing the quantity and condition of their customers' stock, and estimating the value thereof, and frequently acquire some proficiency in making such appraisements. While such estimates are not mathematically correct, they are often approximately so, and are of some value when no better information is to be had. We are of the opinion that where the value of a stock of goods is a relevant fact, and no more accurate evidence is under the circumstances obtainable, the owner of such stock and witnesses acquainted with the value of the different articles of which such stock is composed, and who have observed the same for the purpose of estimating the value thereof, may give their opinion of such value. *Howerton v. Iowa State Ins. Co.*, 105 Mo. App. 575, 80 S. W. 27; 4 Joyce, Insurance, sec. 3769. To otherwise hold would result in a denial of justice in many cases. Suppose the stock of goods had been destroyed by an incendiary against whom the plaintiffs had brought action to recover the value. Must the action fail because the plaintiffs could not furnish an itemized statement of the amount and value of their goods? The rule is not peculiar to cases against insurance companies, but in all cases the law requires, not mathematical certainty, but

merely the best obtainable under the conditions existing, and some reliance must be placed upon the integrity and good faith of witnesses and discretion of juries. The defendant insists that a different rule was adopted by this court in *British-American Ins. Co. v. Columbian Optical Co.*, 76 Neb. 812. In that case there was not a total loss, the goods damaged consisting of 175,000 lenses, which were more or less injured by being smoked and stained. The only excuse for not proving accurately the amount of loss in that case was the time and labor required to make a careful examination of the goods. In holding the evidence insufficient the court say: "We do not mean to hold the plaintiff to the difficult task of inspecting carefully each of the 175,000 lenses; but an inspection of each box or envelope and a careful estimate of the damage is not unreasonable." It is very plain that there is nothing in that case to sustain defendant's contention, but that, on the contrary, it supports the doctrine we have above stated that only the best evidence practicably obtainable is required. It is to be remembered that the competency of a witness to testify as an expert rests very largely in the sound discretion of the trial court, whose rulings thereon will not be reversed unless clearly erroneous as a matter of law. *Missouri P. R. Co. v. Fox*, 60 Neb. 531; *Omaha Loan & Trust Co. v. Douglas County*, 62 Neb. 1. The witnesses practically agreed in fixing the value of this stock at about $8,000, and, as it was insured for but $5,000, the defendant could not suffer unless its value was actually below the last stated sum. We think that the evidence was not only admissible, but that it was sufficient to fairly establish that the loss was greater than the amount of the insurance.

4. The seventh paragraph of the defendant's answer was as follows: "Defendant further says that on February 1, 1905, the plaintiffs were making claim against this defendant on the policy in suit, and its adjusting agent was making an investigation under an agreement in wri-

ting with the plaintiffs that said investigation should be without prejudice to the rights of either party under said policy. And on said date the plaintiff Carl Jensen, of and for the firm of Jensen & Swan, made an affidavit sworn to before J. T. Brady, a notary public of Boone county, Nebraska, and gave same to the adjusting agent of this defendant, in which he made the following sworn statement: 'That during the year 1902 we (Jensen & Swan) sold goods to the amount of $18,000; during the year 1903 we sold goods to the amount of $20,000; and during the year 1904 we sold goods to the amount of $30,000; that our profits on goods sold amounted to 20 per cent.' Defendant further says that said statement in said affidavit was made for the purpose of furnishing the defendant with a basis for the computation of the amount of the plaintiff's loss; that said statement was false, and it was intended to deceive this defendant, and because thereof this defendant is not liable on the policy in suit." To this paragraph the plaintiffs did not reply, but interposed a general demurrer, which was not disposed of, and so admitted the truth of the allegations therein contained. The court instructed the jury that, if they found the value of the property exceeded $5,000, the amount of insurance resting thereon, then the facts alleged in this clause of the answer did not constitute a defense; but that, if they found the value of the goods less than $5,000, then these facts were a complete defense to plaintiff's action, and they should find for defendant. Whether this clause in the reply states facts sufficient to constitute a defense in any view of the case we will not consider. It is well settled that the making of an affidavit fixing the value of goods insured at an excessive price will not forfeit the right of the assured to recover where the value of the property actually exceeds the amount of the insurance, so that the same becomes immaterial to the risk. *Springfield Fire & Marine Ins. Co. v. Winn*, 27 Neb. 694; *Home Ins. Co. v. Winn & Co.*, 42 Neb. 331. As the defendant was given the full benefit of the admis-

sion of the facts contained in this paragraph of its answer, there is nothing of which it can complain in respect thereto.

5. The eighth paragraph of the answer, which was likewise demurred to, but not denied, by the reply, averred that on October 11, 1905, the defendant demanded that the plaintiffs appear and submit to an examination on oath "as required by the terms of the policy in suit," and that the plaintiffs failed and refused to submit to such examination. On this branch of the case the court instructed the jury that the failure of the plaintiffs to appear under this notice did not constitute a defense to plaintiff's action. The fire occurred January 17, 1905. The formal denial of liability by the defendant is dated March 9, 1905. This action was begun April 11, 1905, and defendant's demand for the examination was made just six months after the latter date. Defendant ought not to have the right to demand such examination after its formal denial of liability. *Home Fire Ins. Co. v. Fallon,* 45 Neb. 554. Besides, the delay of six months after the commencement of the action and seven months after such denial of liability is unreasonable. *Ætna Ins. Co. v. Simmons,* 49 Neb. 811. The judge of the district court was therefore right.

6. The court instructed the jury to compute the interest on the amount of the loss from the date thereof to October 2, 1906, the first day of the term at which the trial was had. An error was made by the jury in computing the interest, which was corrected by a remittitur filed by the plaintiffs in the court below, and judgment was rendered for the correct amount, computing interest at 7 per cent. per annum from the date of the loss to the first day of the term. The defendant contends that the interest should have been computed only from May 9, 1905, 60 days after the denial of liability. The instruction of the trial court is in conformity with the rule adopted by this court in *Hartford Fire Ins. Co. v. Landfare,* 63 Neb. 559, where it is distinctly held that the pro-

vision for 60 days' delay after proofs of loss are received is waived by a denial of liability, and that in such case interest is to be computed from the date of loss.

There being no error in the record, we recommend that the judgment of the district court be affirmed.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE, EX REL. ELLA MAY NELSON, APPELLEE, V. LINCOLN MEDICAL COLLEGE ET AL., APPELLANTS.*

FILED APRIL 23, 1908. No. 15,031.

1. **Mandamus**: MEDICAL COLLEGES: GRADUATION. A corporation organized under section 15, ch. 16, Comp. St. 1905, is a private eleemosynary institution, and the duty cast by law upon its directors to graduate students who have complied with the regulations of said institution and taken its required course of study is a statutory duty to such an extent as to give the courts jurisdiction in a proper case to compel by mandamus the exercise of that function.
2. **Medical Colleges**: BOARD OF DIRECTORS: RECOMMENDATION OF DEAN OF FACULTY. Under the by-laws of the respondent corporation, the dean of the faculty of the college has the right, and it is his duty, to pass upon the standing of students applying for graduation, and his report to the board that a student has complied with the regulations of the college, and that said scholar has passed in all studies a grade entitling her to graduation, is equivalent to a recommendation of the faculty to the board of directors.
3. **Mandamus**: MEDICAL COLLEGES: ISSUANCE OF DIPLOMA. When the dean has reported to the directors that a student has fulfilled all demands of the institution, and has passed all examinations so as to entitle her to a diploma, and the board of directors arbitrarily and capriciously refuses to graduate the student and issue her diploma, it is the duty of the district court, upon proof of said facts, to issue a writ of mandamus to compel the college corporation and its directors to discharge their said duty.
4. **Evidence** in this case examined, and found to be sufficient to sustain the action of the district court.

* Rehearing denied. See opinion, p. 545, *post*.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

Strode & Strode and *Tibbets & Anderson,* for appellants.

Charles O. Whedon and *J. A. Brown, contra.*

ROOT, C.

Lincoln Medical College is a corporation organized under section 15 *et seq.*, ch. 16, Comp. St. 1905. Its purpose is to prepare students for the practice of medicine and surgery, and it is affiliated with Cotner University. Its course of study is four years, and it maintains a faculty of nineteen members. The articles of incorporation provide for nine directors, and that the officers shall be a president, secretary and treasurer to be chosen by the directors. The articles also state: "The board of directors shall establish such by-laws as they deem necessary for the governing of the business of the corporation, and shall have the power to prescribe the powers and duties of any officer of the corporation." The by-laws provide that a stockholder must be a duly elected member of the faculty and in active work in the regular course of instruction, and that upon severing his relation with the faculty the stockholder shall return his stock to the corporation upon certain terms. The by-laws further provide for an executive board consisting of the president, secretary and treasurer, and that this board shall exercise all power of the board of directors, subject to a confirmation of its acts at the next regular monthly meeting thereof. It is further provided in section 3, art. 8 of the by-laws: "The dean shall have general supervision over the members of the faculty, the methods of teaching and the discipline of the school. He shall have the power to call the faculty together, and at all such meetings he shall be the presiding officer. He shall pass on the standing of all students at the time of graduation, and also upon all applicants for advanced standing." Prior to

June 7, 1906, the board of directors of the college consisted of but five members, and during the period covered by the inquiry herein the respondents Metheny, Ramey and Wilmeth constituted the executive board. Dr. Keys of Omaha was dean of the school.

The relator is a married woman, and in 1902 matriculated as a student at said college, and from thence continued in the various classes till commencement in 1906, when she insists she had completed the course prescribed for students in said college, and was entitled to be graduated and receive her diploma. The executive board determined on June 3, 1906, she had not passed with the required grades in some studies, notably those presided over by respondents Wilmeth, Ramey and Metheny, and that she, with three other students, including her husband, who also studied during the period she was a student at said school, should be "plucked." The five directors met June 5, whereupon, in a discussion over the unfortunate students, Dr. Carriker and Dr. Keys, the latter being the dean, suggested those students were qualified and should graduate. There is some difference as to just what was done at that meeting. Dr. Ramey and Dr. Metheny testified that they offered to produce the examination papers of the students, and to argue the matter with the board, whereas Dr. Wilmeth insisted no one other than himself was competent to mark the answers to his questions. Upon taking a vote, four present voted to ratify the act of the executive board, and one, Dr. Carriker, voted against the proposition. The dean says he voted aye, so he would be in a position to move a reconsideration. Later relator requested that her papers be returned to her, so she might know her grading, but this was refused. The faculty was not called together, nor did the dean pass on the standing of the "plucked" students, except as he insisted in a general way that they were worthy and should be graduated. The directors had made a rule that in final examinations students must answer an average of 80 per cent. of all questions

propounded to them in the aggregate of the examinations, and not fall below 70 per cent. in any one subject.

This action was brought in mandamus to the district court against the corporation and Ramey, Metheny and Wilmeth, praying that the individual respondents be compelled to deliver to the relator her examination papers in order that it might be ascertained whether she had properly passed her examinations, and, if the court should find it necessary, to submit said papers to experts for examination, and if on such examination and report it should be found she had passed her examinations, and was entitled to be graduated, that respondent corporation by its proper officers be required to issue to relator a diploma according to the practice in cases where students are graduated from said respondent. It was claimed by relator that she had taken the necessary work and had answered correctly 80 per cent. of the questions propounded to her on final examinations. The corporation claimed in its return to the writ that relator had not paid her graduation fee, nor pursued a four years' course of study; that she had been conditioned in various studies; that she had failed to pass in the subjects taught by at least four of the instructors, and that the board in the exercise of its discretionary powers had refused to graduate her. The individual respondents, in addition, in their return claim they were without power to graduate relator until directed by a vote of the board of directors. A lengthy and patient hearing was given all parties by the learned trial judge, who held the respondents had acted arbitrarily and without authority in deciding relator was not entitled to graduate, and that said question should be determined by the dean, Dr. Keys, and directed him to forthwith pass upon relator's application for graduation and determine her rights in that respect, and to report his findings to the board of directors and to the court; that, if he reported in favor of the relator's graduation, the respondent corporation forthwith execute and deliver to relator her diploma certifying that she had

graduated from said institution. This order was made June 5, 1906. Respondents, evidently anticipating the order of the court, on the 31st of May, 1906, called a special meeting of the stockholders of the corporation for June 7, and at said time elected respondent Wilmeth dean of the college, elected a board of directors of nine members, and submitted to Wilmeth relator's claim that she was entitled to be graduated. Whereupon Wilmeth found relator had not pursued a four years' course at the college; that she had been conditioned in her studies, and had failed to pass a grade of 70 in eight subjects on her final examinations, and recommended to the directors that she should not be graduated.

At that time Keys was still dean. He had tendered to Cotner University his resignation as dean of the medical school to take effect later than June 7, but this resignation had not been accepted, and had been recalled before Wilmeth's election. In conformity with the court's order Dean Keys on June 6 passed on relator's qualifications for graduation, and found she was entitled to graduate. Dean Keys made report to the court, and respondents filed supplemental answers, setting up their proceedings and the actions of Dr. Wilmeth while acting as dean. The court refused to pass on the regularity of Wilmeth's election, but found that Dr. Keys had been dean during all the time relator had been a student in respondent college, and was peculiarly fitted to pass on her qualifications; that the order of the court was directed to Dean Keys, and his action was conclusive, and thereupon granted a peremptory writ commanding the college and its proper officers to issue a diploma to relator.

1. It is insisted the record affirmatively discloses that relator did not attend the medical school, nor qualify therein, as required to entitle her to a diploma, and reference is made to the announcement of the college that the student must have attended four full courses of medical lectures, no two in any one year, completed three full courses in practical anatomy under direction of the

demonstrator, dissected every part of the human body, successfully passed the final examinations, answering 80 per cent. of all questions propounded, oral and written, and pay all fees before she could be graduated; that the standing of each student will be determined by the professor or instructor in charge of the chair and the grade made upon marks received during the session in oral quizzes, written quizzes and final term examinations. It is claimed relator was absent from her classes from the middle of January, in her sophomore year, to the close of that year; that she failed to pass her examinations under Drs. Gray, Jester, Howard, Andrus, Spradling, Ramey, Metheny and Wilmeth; and that she has not paid all her fees.

The record discloses that the relator gave birth to a child during her attendance at college, and of necessity was absent a short time from all classes; that occasionally she would miss a lecture, but her attendance was much more sustained and continuous than other students. It was shown upon the trial that the football squad would not report till after Thanksgiving; that students were graduated who attended but two years; that one student was absent during one year 54 per cent. of the time, another 40 per cent., others 50 per cent. Concerning the general scholarship, students had been passed who did not take all final examinations, some had not taken intermediate examinations of various studies, and in some instances the board had marked up the grades from 40 reported to 75 so as to bring the students over the required passing grade to entitle them to graduate under the rules. While there is some question about the scholarship of relator in branches taught by Jester, Howard and Spradling, much is cleared up, and the rock she encountered was the respondents Metheny, Ramey and Wilmeth. Those gentlemen refused to permit relator or her attorney to inspect her papers, and refused to produce them in court until ordered to do so by the trial judge. It is claimed there was an unwritten law that a student should not

receive back his papers, but if he failed to grade would receive that information, and if he did grade would be given the percentage. The rule was observed by most of the professors, but not by all of them. Dr. Wilmeth destroyed his papers some time after they were submitted to him, or at least they were disposed of in some manner, and therefore were not produced. There is one remarkable feature of his report to the executive board as to the standing of the four "plucked" students, and that is each one is given a grade of 68 per cent., just 2 per cent. below passing, a remarkable coincidence. Ramey and Metheny produced their papers after an order by the trial court, and they had given relator 57 per cent. and 47 per cent. respectively. Physicians were called by relator and respondents, respectively, and with practical unanimity testified according to the sides for which they were subpœnaed that the markings were far too low or just about correct. If one would believe the eminent professional gentlemen who testified for relator concerning the papers presented by Metheny and Ramey, she should have been credited thereon with 77 to 90 per cent. Dean Keys testified that on Metheny's examination she was entitled to a credit of 84 per cent., and on Ramey's of 77 per cent. Dr. Robinson testified relator was entitled to 94 per cent. on the Metheny papers. Dr. Somers, an eminent practitioner of Omaha, and a member of the state medical board, testified that he had examined relator's examination papers in Dr. Ramey's department, and that she was not entitled to a grade of over 56½ per cent. thereon. One cannot read the record without concluding, as did the trial judge, that a court could not well fix from the conflicting testimony the grade earned by relator in taking the examination before Drs. Ramey and Metheny, nor can one well escape the conviction that the action of respondents was arbitrary and capricious. Respondents dominated the school as absolutely as ever Cæsar did his empire. They constituted the executive board, and a majority of the board of directors, as constituted be-

fore June 7, 1906. Neither the statutes nor the by-laws of the corporation bound those gentlemen in their conduct.

The board of the college, under section 17, ch. 16, Comp. St. 1905, had "power to confer, on the recommendation of the faculty, all such degrees and honors as are conferred by colleges and universities of the United States, and such others, having reference to the course of study and the accomplishment of the student, as they may deem proper"; that is, the board could grant degrees upon the recommendation of the faculty. Yet Dr. Metheny admits the faculty had never met as a body; that never in the history of the college had the faculty been convened to consider a student's qualifications to graduate. Dr. Ramey objected to the members of the faculty coming to the executive board to influence their decision; said that, when they (executive board) made up their minds not to pass a student, the scholar should not be passed. Dr. Metheny says, referring to graduating scholars: "Yes, sir; we claim the right to do that, because it was business in the hands of the executive committee." He further said the members of the faculty were not given a vote on graduating a student. All the respondents claimed that each professor had the autocratic right to fix the grade on his examinations, and that no one had the right to interfere therewith. If respondents are right, a student may pay the college fees, all expense, and devote his entire energies for four years of study in respondent college, and, if upon final examination he should incur the ill will of one professor, that man could prevent the student from graduating or receiving his degree, and, if he had passed successfully every examination with a grade of 100 in each study, still this executive committee of three could preclude a graduation. This is neither the law of the land nor of the institution. Respondents, with all their intellect and determination, while acting as directors, are but creatures of the corporation, exercising delegated power which finds its

source in the laws of Nebraska and the articles of incorporation and by-laws of respondent college. The statute authorizes the selection of a board of not less than five, nor to exceed nine, directors, who have power to adopt by-laws and rules for the government of the artificial person. The articles of incorporation authorize the directors to adopt by-laws "for the governing of the business of the corporation," and that the directors should have full power to prescribe the powers and duties of the officers of the corporation. Acting under this grant of power, the board of directors in the by-laws created the office of dean, and gave the incumbent thereof the power to call the faculty together, and "he shall pass on the standing of all students at the time of graduation." Presumably the dean would be a man of superior attainments; probably more generally learned than the occupant of any chair in the college, and a man of broad views, of judicial temperament, to whom finally all questions of moment should be submitted for decision. The dean would not come in contact with students in those branches of learning taught by most of the professors He would not be colored with that prejudice that sometimes instinctively and without any well-known reason is created between some individuals, so that, should any professor so far forget himself and his high calling as to unjustly discredit a student's work, the dean with propriety could pass upon that scholar's standing. The faculty of respondent has never as a body exercised this function of recommendation. Each member thereof has sent in his report, and action by the dean has been taken thereon. In making a recommendation for graduation the members of the faculty do not exercise a corporate function, and there is nothing in the statute to prevent the adoption of a reasonable and orderly method of collecting the opinions of the professors, and, if necessary, of having those opinions reviewed by some competent and superior member, so that the recommendations may be crystalized into a recommendation upon which it will

be the duty of the board of directors, in the name of the college, to act.

2. It is said mandamus is not the proper remedy; that relator has her action in damages or for a specific performance of her contract, and that the court cannot by said writ control the exercise of a discretion vested in the board of directors. We held in *Moores v. State*, 71 Neb. 522, that the application for a writ of mandamus is addressed to the sound judicial discretion of the court; that after its issue, it is only in a clear case of abuse of discretion that the granting of the writ will be reversed. Did the trial court abuse its discretion in issuing the writ? Defendant is a private corporation of an eleemosynary character. *Regents of University v. Williams*, 9 Gill & Johns. (Md.) 365, 31 Am. Dec. 72; *Board of Education v. Bakewell*, 122 Ill. 339. To encourage the dissemination of learning, individuals are permitted to incorporate under section 15, ch. 16, Comp. St. 1905. That corporation is authorized to receive and retain donations of property, and its assets are exempt from taxation. The directors, upon recommendation of the faculty, are clothed with power to issue diplomas and grant degrees to the students, and, when they do so, they exercise a corporate power and perform a duty cast upon them by statute. The fact that the statute is not mandatory in its terms will not excuse the board from performing its duty to relator. *People v. Board of Supervisors*, 51 N. Y. 401. Mandamus will lie. Merrill, Mandamus, secs. 157, 158. In *State v. School District*, 31 Neb. 552, we issued a peremptory writ of mandamus, after hearing, to compel the reinstatement of a pupil improperly excluded from the public schools. In *Jackson v. State*, 57 Neb. 183, we issued the writ commanding those in control of the state normal school at Peru to admit a student to said school. *Vermillion v. State*, 78 Neb. 107. In *State v. Milwaukee Medical College*, 128 Wis. 7, the court refused to issue the writ to compel the Milwaukee Medical College to make out and

deliver to relator his diploma of graduation from said school. Mr. Justice Kerwin says: "The case made is clearly one of breach of contract, and the question arises whether mandamus will lie to compel a private corporation to perform its contract." The conclusion in that case was that the relator had ample remedy in an action for damages or for the specific performance of his contract. We do not take the view of the Wisconsin court, and refuse to accept its judgment as precedent. We are of opinion that there is enough of statutory duty on the part of respondent to comply with relator's demand, to invest the court with jurisdiction to issue the writ. In *Baltimore University v. Colton*, 98 Md. 623, 64 L. R. A. 108, a mandamus was issued to reinstate relator as a student in the law department of the university. Mr. Justice Fowler stated in said case that an action for damages was not an adequate remedy, nor would specific performance lie, for the reason that mandamus was an adequate legal remedy. In *People v. Bellevue Hospital*, 60 Hun (N. Y.), 107, relator had completed his medical course, but had been arbitrarily refused permission to present himself for examination or to receive the degree to which he was entitled. The general term reversed an order made at circuit denying the writ, and in the court of appeals the order of the general term was affirmed. 128 N. Y. 621. In *Keller v. Hewitt*, 109 Cal. 146, relator had applied for a grammar grade certificate entitling her to teach in the public schools. She took the examination, and passed all branches according to the rule established by the board, and was found to be a person of good moral character, yet the board refused her the certificate. The board was compelled by writ of mandamus to perform its plain duty. In the instant case the dean has settled relator's standing in respondent college and her scholarship so far as her right to a diploma is concerned, and, in refusing to do what the statute in effect requires it to do, respondent is declin-

ing to perform one of the very functions for which it was created.

The action of respondents Wilmeth, Metheny and Ramey, acting in conjunction with the greater number of the stockholders, in selecting Wilmeth dean, after the interlocutory order directing Keys to pass upon relator's scholarship and examinations, is a plain attempt to evade the process and judgment of the court, and emphasizes the bias and prejudice of respondents toward relator, and their contempt for law and its enforcement. However, Keys had acted under the court's order and passed on relator's standing one day before the special election, and before the action of Wilmeth whereby he sought to embalm and perpetuate the actions of himself and associates. The judgment of the district court was not affected by the special election of June 7 and the proceeding following therefrom.

Respondents have been active at every stage of these proceedings in contesting relator's allegation that she had passed the final examinations, and took advantage of the court's order that the dean pass upon her scholarship by procuring Metheny to report adversely to her, so that we need not consider any possible misjoinder or nonjoinder of actions or parties at the commencement of this cause. Courts have maintained that a single writ would issue against all officers concerned in separate but co-operative steps taken in the attainment of one result. In *State v. Bailey*, 7 Ia. 390, a writ was approved that commanded election of officers to canvass a vote and to abstract and report it to the county judge, and to the last-named officer to file the report and declare the result. Merrill, Mandamus, sec. 235. We cannot consider the claim that relator's graduation fee has not been paid, because respondents refused to act for the sole alleged reason that relator had not passed her final examinations, and will not be permitted now to shift their ground. *State v. Board of County Commissioners*, 60 Neb. 566.

Upon the entire record, we are satisfied the learned

trial judge did not abuse the sound judicial discretion of the court in issuing the peremptory writ of mandamus, and we therefore recommend that his judgment be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on motions for rehearing and to open up the case was filed November 6, 1908. *Motions overruled:*

PER CURIAM:

Two motions are on file in this case. One for a rehearing, and the other asking us to allow the respondent to open up the case, to appoint a referee, and take additional evidence in support of the defense interposed in the court below.

Treating of the second motion, we do not understand that any such practice as is here sought to be established ever has obtained in this court. It must be borne in mind that this action was commenced in the district court for Lancaster county, and was there tried and decided upon the evidence and under the issues there framed and presented for the consideration of that tribunal. The respondent, not being satisfied with the result of that trial, has brought the case here for review, and, while his appeal entitles him to a trial *de novo*, still such trial must be had upon the pleadings and the evidence presented to the district court and certified in the record brought here on appeal. This rule is well established, and is without doubt the correct practice. To allow new issues to be framed and additional evidence introduced in cases brought to this court for review would, in effect, destroy the strictly appellate character of the supreme court.

We are therefore of opinion that the second motion should be overruled. As to the motion for a rehearing, after examining the arguments we are of the opinion that our former judgment is right, and the motions are therefore

OVERRULED.

ARCHIE MAXSON, APPELLEE, V. J. I. CASE THRESHING MACHINE COMPANY ET AL., APPELLANTS.

FILED APRIL 23, 1908. No. 15,095.

1. **Master and Servant.** If an agent is given sole charge of the preparation and exhibition of cumbersome and complicated machinery, and calls to his assistance in that occupation one who in good faith enters upon such work, the person thus employed is not a volunteer or trespasser, but for the time being assumes the relation of servant to the master.

2. ———: INJURIES: ASSUMPTION OF RISK: PLEADING. If the assumption of a risk not usually and ordinarily incident to the service is relied on as a defense in an action against the master for negligence, such assumption of risk must be specially pleaded.

3. **Evidence** examined, and found sufficient to warrant the submission of the issues presented to the jury.

4. **Trial:** INSTRUCTIONS. It is not error to refuse to give instructions where the substance thereof is included in instructions given by the court on its own motion.

5. ———: SPECIAL FINDINGS. It is within the discretion of the court to give or refuse to submit to the jury special findings.

6. **The scope of expert evidence** is not restricted to matters of science, art or skill, but extends to any subject in respect to which one may derive by experience special knowledge.

7. **Trial:** INSTRUCTIONS. Mere failure to charge a jury upon a particular proposition of law is not reversible error, unless a suitable instruction has been tendered.

8. **Appeal:** INSTRUCTIONS: HARMLESS ERROR. This court will disregard any error or defect in instructions given or error in the failure or refusal to give instructions requested, where the action of the trial court did not affect the substantial rights of the litigants.

APPEAL from the district court for Thayer county: LESLIE G. HURD, JUDGE. *Affirmed.*

C. L. Richards and *Cary, Upham & Black*, for appellants.

F. M. Hall, W. E. Goodhue and *C. C. Marlay, contra.*

ROOT, C.

Plaintiff recovered a judgment against defendants for personal injuries inflicted on him in the loss of his right arm while assisting defendant Thorpe in an attempt to place a belt in position upon a threshing machine. The alleged negligence consists in (1) failure and neglect to instruct plaintiff as to the danger inherent, but not obvious, in the employment he entered; (2) in furnishing a belt that was too short and not intended for that make of machine; (3) because an engineer was not provided for the engine that operated the separator; (4) in attempting to place the belt upon the feeder and cylinder pulleys while the latter was in rapid motion and no one was in charge of the engine.

Viewed in the favorable light plaintiff is entitled to have the evidence considered, because the jurors found for him, the testimony tends to establish that plaintiff had been reared on a farm, but had picked up considerable knowledge as a machinist and had worked in a small machine repair shop in the village of Hebron. His employer was a Seventh Day Adventist, and Maxson was out of work on Saturdays. Defendant corporation had an agent, one Kuhlman, who sold its machines in Hebron. There is nothing in the record to show the scope of Kuhlman's authority, nor does it seem to be material in adjusting the rights of the parties to this litigation. Thorpe was in the employ of the defendant corporation, the J. I. Case Threshing Machine Company, as "salesman and expert operating machinery, and anything pertaining to their work." He exhibited and demonstrated his em-

ployer's machinery in his territory, which comprised some four counties in southern Nebraska. In this branch of work he had complete control, according to his testimony. The evidence pertaining to the scope of Thorpe's work and his authority must be gathered from his testimony, which went in without objections, and from the circumstances attendant upon his duties as appear in the evidence. It seems to have been the purpose of the defendant corporation to exhibit a steam thresher in Hebron on Saturday, May 21, 1904, and to that end it shipped an engine and separator to said city. Plaintiff noticed the outfit, and Friday evening inquired of Kuhlman and his boy concerning the machinery, and was informed it would be exhibited the following day. The boy said help would be needed. Early Saturday morning plaintiff assisted in placing brasses on the engine, and started a fire in the furnace, so that steam was up when Thorpe arrived at 9:15 o'clock in the forenoon. Thorpe at once commenced placing the machinery in condition for display, and made a general statement to the men and boys congregated about the machine, "You boys get out of here now," to which Maxson answered, "Does that mean me?" And in response Thorpe said: "No; I want you to stay here and help me." From thence till the accident Maxson assisted Thorpe, doing what he was directed by said expert to do, placed the engine in position for the big belt, oiled the pulleys, assisted in placing the power belt and blower belt upon their respective wheels and pulleys, attended to the engine when it stopped on center, and waited generally upon Thorpe. The power from the engine operates through a belt which connects with a shaft situated immediately beneath and across the bed, and about midway between the ends of the separator. A belt connects this shaft with one that turns the cylinder, a ponderous affair, weighing 1,100 pounds. The cylinder shaft is five feet and eight inches above the ground, and in addition to carrying the feeder pulley, which is next to the separator, maintains another pulley at the outer extremity of the

shaft, leaving a space of about four inches on the shaft between the pulleys. At the extreme top and end of the separator is a self-feeding attachment which is operated by a belt attached to a pulley upon the feeder shaft and a pulley upon the cylinder shaft. After Thorpe and plaintiff had placed the power belt upon the engine and separator, and connected the cylinder shaft so it was in motion, making some 220 revolutions a minute, Thorpe took a belt so as to connect the cylinder pulley with the one on the feeder shaft. This belt was fifteen feet and four inches in length from end to end, or seven feet and eight inches with the ends connected. Thorpe stood on the top of the separator, and directed plaintiff to place the belt on the revolving cylinder pulley of the cylinder shaft. Plaintiff thereupon stood upon the front wheel of the separator, with his right hand against the body thereof, and beneath the strands of the belt, and with his left hand placed the belt upon the pulley. Thorpe then tried to put the upper end of the belt, which he retained in his hands, upon the feeder pulley, but was unsuccessful, and permitted the belt to sag back so that it became disengaged from the cylinder pulley. Plaintiff then shouted to Thorpe not to pull the belt, but either he was not heard or not heeded. Thorpe tightened the belt. It was pulled from his hands, and in the fraction of a second plaintiff's arm was torn or knocked from his body close to the shoulder. Experts testified that the operation attempted was dangerous, and that plaintiff's position was one of peril. There was testimony tending to prove that the belt used was not adapted to the separator; that it was an old one and too short; and that after the accident Thorpe laced in an extension, and thereafter used the belt. Thorpe explains that the belt was manufactured to be used on the separator without a tightener. This attachment seems to be an improvement adopted about 1904 by the defendant corporation, and consists of a small pulley fixed to a stationary shaft which protrudes from the side of the separator at a point between and in line

with the axes of the feeder and cylinder pulleys. This pulley was arranged so that it might be raised or lowered, and the upper strand of the feeder belt, when the tightener was used, was made to pass under the tightener pulley. The tightener might or might not be used. In the former case is necessitated a belt some inches longer than the other. Thorpe also says that he laced in the extra strip of belting so that he might use the tightener; that the old belt was used without the tightener after the accident and before the noon hour, and during the noon intermission he took the belt off, laced in the extension, and thereafter used the belt with the tightener. There was testimony to the effect that a tightener was not attached to the separator. Thorpe denies employing plaintiff or requesting him to do anything, and denies that plaintiff assisted him at all. Thorpe also says he did not need any assistance in preparing and exhibiting the machinery, and Davis, defendant's expert, says assistance is not necessary or furnished experts engaged in exhibiting threshing machinery. The statements of Thorpe are in many instances contradicted by the testimony of the bystanders, and the evidence given by plaintiff, corroborated.

1. Defendants strenuously insist the testimony does not establish the relation of master and servant between plaintiff and the defendant corporation, and that the court improperly instructed the jury on this point. The court instructed the jurors: "The plaintiff alleges that he was employed by the defendants at the time he received the injury complained of; that is, he was a servant of the defendant J. I. Case Threshing Machine Company. As to this, you are instructed that there is no dispute but that the threshing outfit was owned by the defendant Case company, and was in charge of Thorpe, who was then an employee of the company; and, if you further find it established by a fair preponderance of the evidence that Thorpe's employment and duty was to put the engine and separator in operating condition in order to operate the same for the purposes of exhibition, and in order to carry

out that employment he requested the plaintiff Archie Maxson to assist him therein, and the said Maxson did assist him in such work in compliance with said request, and the said Thorpe gave directions and instructions from time to time as said work progressed as to what the said Archie Maxson should do in and about putting the machinery in order and adjusting the same, and do whatever was necessary and required by the defendant Thorpe in the preparation of said engine and separator for operation and exhibition, then as a matter of law this would amount to an employment for the time being for such purpose and work of the said plaintiff by the defendant J. I. Case Threshing Machine Company, and the plaintiff was for the time being a servant of said company; and, unless you find that he was a servant and so in the employ of the defendant company, then your verdict should be for the defendants. It is not sufficient to entitle him to recover that he merely show that he officiously and without request or employment volunteered his assistance in and about putting the machinery in working order, and while so intermeddling was injured as set forth in the petition. On the other hand, it was not absolutely necessary that he should have been employed to work for any specified time or to receive any specific compensation."

It is claimed the relation of master and servant cannot be created except with the consent of the master, or by his express authority, or in special instances where a servant of the master without express authority is compelled from necessity or in some exigency to secure assistance, and that the testimony does not bring plaintiff within any of said rules, nor the instruction properly state the law in this regard to the jury. We consider both objections together. It may be conceded that the master owes no duty as master to an officious intermeddler who volunteers his services without an invitation express or implied from the master, but this is not the case. Plaintiff may have been, and likely was, a volunteer in all that was done before Thorpe arrived to take charge of

the machine, although it was not from a spirit of meddling that he acted, but only to secure employment from the man seemingly in authority. Subsequent to Thorpe's statement that he wanted the plaintiff to remain and help, we think he came within the reasoning of Mr. Justice Weaver in *Aga v. Harbach,* 127 Ia. 144, 109 Am. St. Rep. 377: "While the master owes no duty to the intermeddler who officiously interferes and undertakes to perform services without request or employment, and while some courts are inclined to put in the same category those who perform services at the request or order of a servant having no general authority to employ or discharge assistants, the general consensus of opinion seems to be that one who in good faith enters upon the master's work at the request of a servant in apparent charge of such work is not a trespasser, but assumes for the time being the relation of a servant. As such servant, he occupies the same relation, and becomes subject to the same rules, including the operation of the fellow-servant rule, as do those who are directly employed by the master, even though he may not be entitled to recover wages." *Johnson v. Ashland Water Co.,* 71 Wis. 553, 5 Am. St. Rep. 243; *Barstow v. Old Colony R. Co.,* 143 Mass. 535; *Georgia P. R. Co. v. Propst,* 83 Ala. 518, 3 So. 764; *Newport News & M. R. Co. v. Carroll,* 31 S. W. (Ky.) 132.

Defendants have collated many authorities to sustain their position. As might be expected, each case presents the facts peculiar to its history, and not one parallels the instant one. *Conkey v. Bueherer,* 84 Ill. App. 633, it was insisted on the argument is directly in point. In that case a wagon broke down, and it was necessary to place a scantling beneath the broken axle and fasten it upon the one intact. A stranger volunteered to go under the broken wagon and fasten the scantling, and while engaged in that undertaking the team attached to the wrecked vehicle ran away, injuring the volunteer. A fellow teamster employed by the master of the driver of the wrecked wagon was standing by, and the court held there

was no such necessity or exigency as would justify the volunteer doing what he did on the assumption that he was becoming the servant of the teamster's master. The wagon was a simple contrivance not likely to break down, and easily handled by the teamster in any event. Still other cases refer to an engineer, a brakeman or the conductor of a railway train requesting an individual to assist in switching cars, or controlling the brakes attached to them. In those cases it might not be out of the way to consider the usual course of business in the operating of railways so notorious as to be known to a considerable degree by all persons; that the work of switching or braking requires skill to a degree; that trainmen are not authorized to employ assistance; and that they are in easy telegraphic communication with their immediate superiors who could extend authority if more help was necessary or convenient in handling the cars or train. In the instant case the master was a corporation resident in a distant state, the machinery was complex, and the agent who had sole charge and control thereof came late in the forenoon of the day, and was hurrying to place it in condition for exhibition. Under those circumstances, it seems reasonable to believe a man seeking employment would have a right to rely on the expert's authority to employ assistance. It also seems reasonable to hold that the defendant corporation would be charged with notice of the fact that for the advancement of its own interests its expert in sole charge of the machinery at times ought to and might employ assistance. On the argument it was admitted that, if it became necessary to move the machinery, the expert might employ assistance, because the necessity would then arise. But we think the determination of the necessity would be largely confided to the expert and agent, and that the corporation cannot be heard to say had Thorpe employed a teamster to move the machine it would have been the teamster's master, but such relation could not be created in the instant case. We do not find a scintilla of evidence in the record given

by any officer or agent in control of Thorpe that he did not have authority to employ plaintiff, or that Thorpe had not been in the habit of employing assistance in such cases. It has been said that one known to be an agent is presumed to be acting within the scope of his authority. *Austrian & Co. v. Springer,* 94 Mich. 343, 34 Am. St. Rep. 350. We are satisfied the instruction referred to is not erroneous in submitting the issue of employment to the jurors, and that the testimony in the record will support a finding that plaintiff was the servant of the J. I. Case Threshing Machine Company at the time he was injured.

2. It is insisted that the dangers incident to the service plaintiff performed were obvious, and that he ought in reason to have comprehended and avoided them. We cannot say as a matter of law that the dangers were obvious to an unskilled workman. Plaintiff testified he did not know or understand the dangers pertaining to the work, and that he had never assisted in placing a belt upon the pulleys of a threshing machine. The court in its fifth instruction informed the jurors "that an employee assumes all the risk arising from the ordinary and necessary dangers connected with his business or employment in which he engages, and assumes the risk arising from the dangerous and unsafe condition of premises or machinery and apparatus wherein or in connection with which his labor is to be performed, when the risks and conditions are known to him, or are apparent and obvious to persons of ordinary experience and understanding." In *Pullman Palace Car Co. v. Harkins,* 55 Fed. 932, it was held that experts might properly testify to dangers lurking in the operation of shafting and belts in much the same condition and relation to each other as in the instant case. Experts are not permitted to testify to conditions that are "apparent and obvious to persons of ordinary understanding." Defendants, as well as plaintiff, interrogated experts upon the identical point, and the court did not err in refusing to instruct the jurors

or in not holding that the perils were plain and obvious, but properly submitted that issue to the triers of fact. As to dangers other than those that could be discovered from observation by a person of ordinary intelligence, defendants cannot complain, because they did not plead assumption of any specific risk, and therefore are confined to patent dangers. *Union Stock Yards Co. v. Goodwin,* 57 Neb. 138; *Evans Laundry Co. v. Crawford,* 67 Neb. 153.

3. Defendants complain of the seventh instruction, which is as follows: "The jury are instructed that it is the duty of the master to inspect and investigate risks to which its servant is exposed, and the servant may rely upon the master performing that duty, and if in this case the plaintiff proceeded under the orders of Thorpe as the representative of the said defendant J. I. Case Threshing Machine Company in performing the act of assisting in putting on the feeder belt, and in so doing was exposed to unusual danger and the injury resulting therefrom, then the J. I. Case Threshing Machine Company would be liable for such injury to the said plaintiff, unless the risk of the act of assisting in putting said feeder belt on while the cylinder pulley was in motion was to the plaintiff so apparent that a man of ordinary prudence situated as he was would not have undertaken it." It is said that the master's duty to investigate risks is relative, and not absolute; that the instruction ignores the issue of the relation of master and servant, ignores the issue of defendant's alleged negligence, and also of plaintiff's contributory negligence, limits the issue solely to whether the risk of putting the feeder belt on the revolving cylinder pulley was apparent to a man of ordinary prudence, and ignores the presumption that plaintiff had sufficient understanding to comprehend the dangers incident to his employment. The instruction is not faultless, but we think, when it is read in connection with the other instructions given by the court, it cannot be said to be prejudicially erroneous to de-

fendants. Defendants could not have been prejudiced by stating that it was the duty of the master to inspect risks to which his servant may be exposed, because the judge does not say the failure to do so in the instant case gave plaintiff any cause for action. Later in the instruction he informs the jurors that defendants would not be liable if the risk was obvious, and also advises them that, if acting under the orders of Thorpe, the vice-principal, plaintiff was exposed to unusual danger and he was injured thereby, there might be a recovery. In the third instruction the jurors were told plaintiff could not recover unless he established the relation of master and servant between the defendants and himself. In the same instruction and the fifth instruction the grounds for recovery are explicitly stated. In the second instruction the jurors are informed that the burden of proof is on plaintiff to make out his case by a preponderance of the evidence, and in the fifth instruction they are also told plaintiff must show his injuries did not result from his own negligence or carelessness. As to the failure to include a statement concerning the presumption that plaintiff knew of the dangers referred to, defendants did not ask an instruction on this point, and they ought not now to complain. Section 145 of the code directs: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." The application of this positive mandate of the law compels us to ignore the peculiarities and alleged error in this instruction. We do not commend the instruction, but much of its crudeness is cured by reference to other instructions given. Instructions will be read together, and not detached from each other. *Stein v. Vannice,* 44 Neb. 132; *Blakeslee v. Ervin,* 40 Neb. 130; *Hoffine v. Ewings,* 60 Neb. 729.

4. Defendants claim the court should have withdrawn from the jurors the allegation that the belt was too short.

It would have been reversible error to have done so, as there is ample evidence in the record to sustain an affirmative finding on that issue, if Thorpe be disbelieved and plaintiff and his witnesses credited with telling the truth. To the further claim that it was negligence to attempt to put on the feeder belt with the machinery in motion and no one in charge of the engine, it may be said the evidence upon this issue was sufficient, in our judgment, to go to the jury.

5. As to the sixty-first, sixty-second and sixty-third assignments of error, they relate to the court's refusal to instruct the jurors, as requested by defendants, that if in the doing of certain things plaintiff did not exercise ordinary care and prudence, and that omission contributed proximately to his injury, he could not recover. The court had in effect instructed the jurors that, if plaintiff was negligent or careless, he could not recover. It would seem defendants ought not to ask more.

6. The court did not abuse its discretion in declining to submit to the jury special findings, as requested by defendants. *Floaten v. Ferrell,* 24 Neb. 347; *Atchison, T. & S. F. R. Co. v. Lawler,* 40 Neb. 356; *Hedrick v. Strauss,* 42 Neb. 485; *Reed v. McRill,* 41 Neb. 206; *American Fire Ins. Co. v. Landfare,* 56 Neb. 482.

7. Exception is taken to the ruling of the court admitting the testimony of Shaw and White, to the effect that it was dangerous to undertake to put a belt upon the cylinder pulley and feeder pulley while the former was in motion, and that it was dangerous to stand in the position assumed by plaintiff while assisting Thorpe with the belt, and that it was dangerous to stand in the near vicinity of the cylinder pulley while it was in motion and the feeder belt was being handled as the testimony shows it was manipulated in the instant case. Shaw had operated threshing machines for fourteen years, was conversant with their operation, and knew about the construction and operation of the J. I. Case machines. White had operated different kinds of threshing machines,

including the Case, for six years and was familiar with the methods and manner of gearing up, belting and unbelting those machines. Both witnesses testified the cylinder pulley should properly be at rest when the belt therefrom to the feeder pulley was being placed in position; that the work plaintiff was directed by Thorpe to do was dangerous, and under the circumstances testified to by plaintiff and some of his witnesses it was dangerous to life and limb for any one to stand within the radius of the belt should it slip from the operator's hands and commence to wrap around the cylinder shaft. Defendant's witnesses, on the other hand, stated that one in Thorpe's position could with safety to the operator place the belt under the cylinder pulley, and from thence run it over the feeder pulley, and whereas with a machine that had been in use the belts were put in position upon the various pulleys before the machine was started in motion, that with new machines like the one on exhibition the parts of the machine should be worked out one at a time, and first one and then another belt put in place, and that part of the machine worked for a time, and then another. Davis, defendant's expert, said it was dangerous to connect the cylinder pulley with the feeder pulley when the former was in rapid motion, but thought 220 revolutions a minute was not rapid motion.

While the admission of incompetent evidence offered by one party will not make admissible incompetent evidence offered by the other litigant, yet the record discloses that defendants, as well as plaintiff, construed the subject one proper for experts to explain. "The scope of expert evidence is not restricted to matters of science, art or skill, but extends to any subject in respect to which one may derive by experience special and peculiar knowledge." *Zarnik v. Reiss Coal Co.*, 133 Wis. 290. The testimony falls within the principles discussed in *Baltimore & O. R. Co. v. Schultz*, 43 Ohio St. 270, and approved by us in *Read v. Valley Land & Cattle Co.*, 66 Neb. 423. The danger lurking in the handling of the

belt under circumstances detailed by plaintiff was not patent to such an extent as inexperienced persons upon inspection could appreciate. In *Pullman Palace Car Co. v. Harkins,* 55 Fed. 932, an action to recover for the death of an employee who was caught in a rapidly revolving shaft, it was held proper to permit one having practical experience to testify that the revolving shaft was dangerous machinery; as one witness said, "A harmless looking thing to an ignorant man." *Transportation Line v. Hope,* 95 U. S. 297; *Alabama M. R. Co. v. Jones,* 114 Ala. 519, 21 So. 507; *Garberg v. Samuels,* 27 R. I. 359; *Zarnik v. Reiss Coal Co., supra.* The testimony did not go to the ultimate fact, which was solely for the jurors' determination, and the court properly admitted it for their assistance. Some of the questions were leading, and the court would not have committed error had it sustained objections thereto. Probably the jurors would have received as much assistance had the questions been couched in somewhat different form, but the case ought not to be reversed because of the admission of the testimony referred to.

8. Defendant corporation requested, and the court refused to give, an instruction that, "to entitle the plaintiff to recover, he must not only establish by a preponderance of the evidence that his injury was the natural consequence of the act or omission of the defendant Thorpe, but it must also appear, under all the circumstances, defendant Thorpe ought reasonably to have foreseen that injury might result from his (Thorpe's) act of omission." This instruction was faulty in at least ignoring the alleged negligence of the corporation defendant in furnishing a belt not adapted to the threshing machine on exhibition. If improper appliances were negligently furnished plaintiff, and he was, without negligence on his part, injured thereby, the fact that Thorpe might not, under all the circumstances of the case, have reasonably anticipated injury to plaintiff would not absolve the company from responding in damages in this case. Thorpe,

it will be observed, did not ask this instruction. It is the established law in this court that mere failure to charge the jury upon a particular proposition of law is not reversible error, unless a suitable instruction has been tendered. *Johnson v. State,* 53 Neb. 103; *Reynolds v. State,* 53 Neb. 761. Waiving the suggested defect in this instruction, it will be observed that the court had instructed the jury that the fact plaintiff was injured would not establish defendant's negligence; that the injury must have been the proximate result of defendant's negligence; and that, "before you can find the defendants liable to the plaintiff in damages for the injury complained of, you must find that the defendants were chargeable with some one or more of the acts of negligence charged in the petition, and you must also find that such negligence was the proximate cause of plaintiff's injury." The court also gave an abstract definition of negligence, and properly instructed the jury that the burden of proof was on the plaintiff. The pleadings were sent out with the jury for consultation in their deliberations. In its answer the corporation defendant admitted that "Thorpe was well experienced in all matters pertaining to the management, control, operation and running of the threshing machine." Thorpe therefore ought to have appreciated the danger to which plaintiff was exposed, and the jurors could apply the evidence just as certainly without as with the instruction refused. The only possible intervening negligence suggested by defendants was the alleged contributory negligence of plaintiff, and that phase of the case was fully covered in the fifth instruction given by the court. We do not think the jurors were permitted to go astray by the lack of this instruction, nor that, if it had been given, the verdict would have been other than it was. The error assigned is not well taken. Code, section 145.

This case seems to have been skilfully tried by opposing counsel. The trial court was fair in its rulings on the admission and exclusion of evidence, and fairly sub-

mitted the questions of fact to the jury. The verdict, $2,700, is not excessive, and we conclude the judgment of the district court should be affirmed, and we so recommend.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE W. ASHFORD, APPELLEE, V. IOWA & MINNESOTA LUMBER COMPANY, APPELLANT.

FILED APRIL 23, 1908. No. 15,133.

1. **Mechanic's Lien:** TIME FOR FILING. A subcontractor whose only agreement is with the contractor cannot extend the time within which he may file a mechanic's lien, by donating material to the owner of the building nor by substituting proper material for defective lumber theretofore furnished the contractor.

2. ———: SUBCONTRACTOR. A subcontractor who furnishes materials for a building, and whose compact is with the contractor alone, cannot acquire a lien under the statute for material that was neither used in the construction of said building, nor delivered on the premises for such use.

3. ———: PRESUMPTIONS. Where more than 60 days intervene between the items of an account used by a subcontractor as the basis for a mechanic's lien, it will be presumed that those items were furnished under separate contracts.

4. ———: FRAUDULENT ACTS. A small amount of labor performed, or material furnished without the request of the owner of the building, after he has unconditionally accepted said structure, and under circumstances indicating bad faith on the part of the material man and the contractor, will not support a mechanic's lien.

5. **Appeal:** HARMLESS ERROR. This court will not reverse or modify a decree for a possible error of 10 cents therein.

6. **Evidence** in this case examined, and *held* to justify the findings of the trial court.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. C. Robinson, J. V. Pearson and *Joy & Burton,* for appellant.

Sullivan & Griffin and *William P. Warner, contra.*

ROOT, C.

July 19, 1904, defendant Wiseman agreed in writing to furnish the materials and construct a dwelling house in Homer for plaintiff. Wiseman made an estimate of the lumber necessary for said building, and purchased it from defendant Iowa & Minnesota Lumber Company, an Iowa corporation doing business in Sioux City, some 15 miles distant from Homer. The general manager of said corporation, acting for it, signed as surety a bond wherein Wiseman agreed to pay for all material used in, and the laborers employed on, said building. The venture was a disastrous one for Wiseman, and the defendant lumber company and other material men filed liens against said building. Plaintiff had in his possession at the commencement of this action $670 of the contract price for the building, and requests herein that the equities of all parties be adjusted by the court, putting all lienors on proof as to the validity of their claims, offers to pay the money due Wiseman on the contract to whomsoever the court may direct, and requests that the lumber company be held on its said bond. The lumber company defended against the bond as an *ultra vires* act, and in its cross-petition claimed a lien for the material furnished Wiseman. After a protracted trial the district court held that the lien of defendant lumber company had not been filed within 60 days of the furnishing of the last material to Wiseman, and was void, and further ordered the distribution of the money in plaintiff's hands among the other defendants herein. The appeal is prosecuted by the lum-

ber company only, and we will hereafter refer to it as the defendant.

Section 7101, Ann. St. 1907, provides that the verified claim of a subcontractor shall be filed with the register of deeds "within sixty days from the performing of such labor or furnishing such material, machinery, or fixtures." The lumber was charged to Wiseman July 12, and was shipped from Sioux City to Homer on the 13th, 16th and 18th days of July, and the 7th and 22d days of September. The verified statement for a lien was filed December 23, and its validity depends upon any one of three items charged therein, to wit, November 7, cypress lumber, $3.75; November 18, 36 feet of plate rail, $4.95, or December 21, 10 cents' worth of plaster.

Concerning the cypress lumber, a dispute arose between plaintiff and Wiseman as to whether the proper material had been used in a cupboard constructed in the building, and the architect, who according to the contract was the arbiter, held with plaintiff. The lumber company's manager said that to settle the dispute he would donate the material, and we are satisfied from a consideration of the evidence, and find therefrom, that said material was not furnished Wiseman on his contract to construct said building, but was a donation pure and simple to replace material not in conformity with the specifications in the contract between Wiseman and plaintiff. Whether the donation was to plaintiff or to Wiseman, it did not extend the time within which the lien might be filed. *Congdon v. Kendall,* 53 Neb. 282; *Harrison & Bro. v. Homœopathic Ass'n,* 134 Pa. St. 558; *Woodruff v. Hovey,* 91 Me. 116; *Hartley v. Richardson,* 91 Me. 424; *King v. Ship Building Co.,* 50 Ohio St. 320; *Schaub & Sons Co. v. Frieze,* 107 Mo. App. 553, 81 S. W. 1174. Defendant cites *Minneapolis Trust Co. v. Great N. R. Co.,* 74 Minn. 30, and if that case is held to be authority it will sustain its contention. We have carefully considered the case, and conclude that to adopt the views of the Minnesota court as controlling in this case would necessitate discrediting our

opinion in *Congdon v. Kendall, supra,* and that we are not prepared to do.

The plate rail charged November 18 was never delivered on the premises or used in the construction of plaintiff's building, but entered into the construction of a dwelling built in Homer by Wiseman for a Mr. Ryan. The evidence does not bring the defendant within any of the exceptions suggested by Mr. Justice MAXWELL in *Foster v. Dohle,* 17 Neb. 631, and *Marrener v. Paxton,* 17 Neb. 634, and therefore, as to the item of the plate rail charged November 18, 1904, defendant is not entitled to a lien. *Pomeroy v. White Lake Lumber Co.*, 33 Neb. 243; *Weir & Co. v. Barnes*, 38 Neb. 875; *North v. Globe Fence Co.*, 144 Mich. 557; *Roebling Sons Co. v. Bear Valley Irrigation Co.*, 99 Cal. 488; *Stimson Mill Co. v. Los Angeles T. Co.*, 141 Cal. 30; *McGarry v. Averill,* 50 Kan. 362, 34 Am. St. Rep. 121.

The 10 cents' worth of plaster is charged more than 60 days after the next preceding item, and the presumption therefore exists that it was furnished by virtue of a separate contract between Wiseman and defendant. *Buchanan v. Selden*, 43 Neb. 561; *Central Loan & Trust Co. v. O'Sullivan,* 44 Neb. 834; *Hansen v. Kinney*, 46 Neb. 207. We do not find that this presumption was overcome by the evidence. Plaintiff Wiseman, defendant's manager and the architect had examined the house the day before Thanksgiving, and had accepted it, waiving any little deficiencies therein. December 15 all parties in interest had a settlement in Sioux City, and then and there agreed upon the balance due upon the contract and for extras. Defendant's manager, the contractor and a mechanic came from Sioux City December 21, and, by some means, gained access to the house in plaintiff's absence, repaired some small flaws in the plaster, and returned home without notifying plaintiff, and he did not, for some time thereafter, know that they had used said plaster in his building. The defendant had not theretofore furnished any plaster for the building, nor do we

find from a consideration of the evidence that plaster was included in any agreement between the contractor and defendant. We are of opinion that Wiseman and defendant expected to acquire an undue advantage over plaintiff by this voluntary and insignificant repair, that the material was not furnished in good faith, and that the trial court was warranted in rejecting this item as not furnished under the July agreement.

Defendant cites *Bankers Building & Loan Ass'n v. Williams*, 4 Neb. (Unof.) 795. In that case the work was done in conformity with the terms of the contract, and had been delayed to accommodate the owner, and the contest was between the assignee of the contractor on the one hand and the owner on the other. The instant case comes well within the exceptions noted by Mr. Commissioner BARNES in his opinion in that case. In the instant case the defendant had not agreed with Ashford to furnish any material, and the plaster did not round out a contractual obligation, as did the work of Briggs in *Bankers Building & Loan Ass'n v. Williams, supra*. We do not think that in a case of this magnitude there should be a reversal, or a judgment entered here, for a ten-cent lien, but that if we should find the trial court erred to the extent of 10 cents in its decree the doctrine of *de minimis non curat lex* should apply. *United States Express Co. v. Anthony*, 5 Kan. 490; *Palmer v. Degan*, 58 Minn. 505; *London & N. W. A. M. Co. v. Gibson*, 77 Minn. 394; *Burlington & M. R. R. Co. v. Lancaster County*, 15 Neb. 252.

Upon some of the issues the evidence is in sharp and irreconcilable conflict, and the findings of the district court thereon are entitled to, and have been given, some, but not controlling, weight. *Faulkner v. Simms*, 68 Neb. 295; *Cooley v. Rafter*, 80 Neb. 181; *Wetherell v. Adams*, 80 Neb. 584. It is not necessary to determine, and we do not decide, the status of the bond referred to in this cause.

Upon the entire record, we are satisfied that the judg-

ment of the district court should be approved, and we therefore recommend that it be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

BANK OF MILLER, APPELLANT, V. THOMAS E. MOORE ET AL., APPELLEES.

FILED APRIL 23, 1908. No. 15,135.

1. **Pleading**: DEMURRER. Judgment on a general demurrer must go against the party whose pleading was first defective in substance.
2. ———: ———: FRAUD: LIMITATIONS. A petition for relief on the ground of fraud, which shows on its face that the action was not commenced within four years of the perpetration of the wrongful acts, and fails to show plaintiff did not know or was not charged with knowledge of the fraud until within less than four years before the commencement of the action, is demurrable.
3. ———: ———: LIMITATIONS. Where plaintiff prays for relief because of defendant's alleged fraud, and states in his petition facts which render the petition obnoxious to a general demurrer based on the statute of limitations, an answer alleging "that the plaintiff's cause of action did not accrue within four years next prior to the commencement of this action" is a good plea of the statute of limitations as against a general demurrer.
4. **Dismissal**. Record examined, and *held* that the court rightfully dismissed plaintiff's petition.

APPEAL from the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Fred A. Nye, for appellant.

Warrington & Stewart, contra.

ROOT, C.

January 25, 1907, plaintiff filed its petition against defendants alleging in substance that the defendant Thomas

E. Moore prior to April 19, 1890, became indebted to plaintiff's predecessor, and on said date executed to plaintiff certain promissory notes for the sum of $4,000; that credit was given said defendant on the faith of his representation that he was the owner of a certain quarter section of land situated in Dawson county about six miles from plaintiff's place of business; that plaintiff in December, 1892, brought suit against said defendant upon said notes, and recovered judgment thereon in July, 1894, and filed a transcript thereof in Dawson county; that thereafter the judgment became dormant, was duly revived, and that no part thereof has been paid; that plaintiff caused execution to be issued on said judgment January 21, 1907, which was returned by the sheriff of Dawson county, wherein the defendants reside, wholly unsatisfied, and that said defendant has no property other than said land from which said judgment can be made; that defendant, Thomas E. Moore, on the 3d day of May, 1893, without consideration, and for the sole purpose of cheating, hindering, delaying and defrauding his creditors, and especially plaintiff, conveyed said real estate to his wife, the defendant Mattie Moore, who took said land with full knowledge of the aforesaid facts, and that the defendants then and there and thereby conspired to hinder, delay, cheat and defraud the creditors of the said Thomas E. Moore, and especially plaintiff; that said deed was recorded in May, 1893, and said real estate is now of the value of $10,000. The prayer was that said deed be decreed null and void, and said land ordered sold to satisfy said judgment. No allegation is made that plaintiff did not discover the alleged fraud at the time of its perpetration, nor is any excuse given for not commencing the case within four years of July 2, 1894, the date of the judgment. Defendants answered separately, interposing a number of defenses to the action, and in each answer it is stated "that plaintiff's cause of action did not accrue within four years next prior to the commencement of this action." To said defense plaintiff demurred. The court

overruled the demurrers, plaintiff elected to stand thereon, and its petition was dismissed. Plaintiff insists legal conclusions merely are stated in the answers. Defendants say that the allegations were sufficient to support the plea, and whether they were or not is immaterial, for the reason that the demurrer searches the record and is applied to the first defective pleading; that the petition is demurrable in that it does not state any fact or excuse for not bringing the action without four years of the recovery of the judgment.

1. It was held in *Bennet, Adm'r, v. Hargus,* 1 Neb. 419, that judgment on a demurrer "must be against the party whose pleading was first defective in substance." *Bennet, Adm'r, v. Hargus* was followed with approval in *Hower v. Aultman, Miller & Co.,* 27 Neb. 251, where one may read in the second paragraph of the syllabus: "Under the code, as prior to it, on a demurrer to the answer, if the complaint fails to state a cause of action, judgment on such demurrer should be in favor of the defendant." The principle was thoroughly considered in the body of the opinion, written by Chief Justice REESE. See, also, *Oakley v. Valley County,* 40 Neb. 900; *Hawthorne v. State,* 45 Neb. 871; *West Point W. P. & L. I. Co. v. State,* 49 Neb. 223; *State v. Stuht,* 52 Neb. 209; *State v. Moores,* 52 Neb. 770.

Section 12 of the code, concerning limitations of actions, provides: "Within four years, * * * an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." As stated heretofore plaintiff did not give any excuse or reason for delaying the suit more than four years after the recovery of its judgment. Plaintiff says the burden was on the defendants to plead that plaintiff did have notice of the alleged fraud four years before the suit was commenced. In this, learned counsel errs. In the opinion of Mr. Justice COBB in *Parker v. Kuhn,* 21 Neb. 413, 425, will be found a learned discussion on the application of the Nebraska statute of

limitations in cases where fraud is charged. The learned justice adopts with approval the language of Mr. Justice Clifford in *Godden v. Kimmell,* 99 U. S. 201, to the effect that courts of equity hesitate to enforce stale demands, and that, if relief be sought in such cases, plaintiff should set forth in his bill the reasons for the long delay in prosecuting an action. In *Horbach v. Marsh,* 37 Neb. 22, 38, the reasoning of Mr. Justice COBB, reported in *Parker v. Kuhn, supra,* is approved. In *Newman Grove State Bank v. Linderholm,* 68 Neb. 364, it was squarely held the burden is on the plaintiff to allege any reason or excuse for not bringing his action for relief for alleged fraud within four years of the commission of the wrongful acts; that if the petition disclosed that the fraud had been perpetrated more than four years before the commencement of the action, and some reason for delay is not given in the petition, it is subject to a general demurrer. Therefore, upon legal principles firmly established in Nebraska, plaintiff's petition was demurrable, its demurrer to defendants' answers related back to its petition, and the court was without discretion, except to overrule the demurrers to the answers and dismiss the petition.

2. Plaintiff claims defendants did not properly plead the statute of limitations; that the facts necessary to advise plaintiff and the court that the statute had run were not stated, but mere conclusions of the pleader alleged. We do not approve the language employed, but it was sufficient to withstand a general demurrer. Very similar statements were held sufficient in *Hower v. Aultman,* 27 Neb. 251. The exact language employed by defendants has received the sanction of respectable courts. *Searls v. Knapp,* 5 S. Dak. 325, 49 Am. St. Rep. 873; *McConnell v. Spicker,* 15 S. Dak. 98; *Piper v. Hoard,* 107 N. Y. 67, 1 Am. St. Rep. 785; *Jex v. Mayor,* 111 N. Y. 339; *Douglass v. McCarer, Adm'r,* 80 Ind. 91; *De Armond v. Ballou,* 122 Ind. 398; *Evans v. Jackson,* 41 Tex. Civ. App. 277, 92 S. W. 47; *Lewis Co. v. Adamski,* 131 Wis. 311. Whatever the plea of the statute of limitations may have lacked as

to dates was supplied by the petition, and, if an aider was essential, the petition supplied the deficiency. *Railway Officials & E. A. Ass'n v. Drummond,* 56 Neb. 235.

Plaintiff relies on three Nebraska cases. In *Barnes v. McMurtry,* 29 Neb. 178, the defendant sought to avail itself of a provision in an insurance policy that suit thereon would be barred, unless brought within six months "next ensuing after the fire, exclusive of any time consumed in arbitration," and defendant alleged that, exclusive of any time consumed in arbitration, more than six months had elapsed since the date of the fire, and the suit, therefore, was barred by the agreement of the parties. Mr. Justice MAXWELL said: "There is no allegation in the answer that proof of loss was accepted by the defendant as the true measure of damages, and that therefore there had been no arbitration. The inference from the answer is that there had been an arbitration by which the rights of the parties had been adjusted, but when this took place does not appear"; and it was held under the circumstances of that case the answer was not sufficiently specific to avail defendant receiver of the defense of a statute of limitations brought into existence by contract, and not by statute. The first paragraph of the syllabus discriminates between that case and one where the facts appear on the face of the petition. In *Scroggin v. National Lumber Co.,* 41 Neb. 195, the answer contained the statement: "That this suit was not brought within the time required by law, nor until after the so-called lien of plaintiff had expired by lapse of time," and we held the statement insufficient to support the defense of the statute of limitations. The difference between the plea in the cited and the instant case is marked. In *Pinkham v. Pinkham,* 61 Neb. 336, the defendant had alleged "that the alleged action for the reformation of said instrument set forth in the amended answer did not accrue to the defendant, John H. Pinkham, within the statutory period provided by law for proceedings for the reformation of instruments," and we held the

plea inadequate. In the instant case the demurrer admitted the cause had not accrued within four years next preceding the commencement of the action, and that concession was fatal to plaintiff's case.

There is no error in the record, and we therefore recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JEROME M. KEYS, APPELLEE, V. ROBERT O. FINK, COUNTY TREASURER, APPELLANT.

FILED APRIL 23, 1908. No. 15,158.

1. **Pleading.** It is not error to overrule a motion that ought not to be allowed substantially in the form in which it is presented.
2. ———: PAYMENT. A general allegation that a demand or obligation has been fully paid, without giving the date of payment, the amount paid, or the person to whom payment was made, is a statement of fact broad enough to permit the pleader to introduce evidence to prove that payment was actually made to the person entitled to the money and in an amount sufficient to satisfy the debt.
3. **Taxation:** PROOF OF PAYMENT. Proof of the payment of taxes may be made by production of the original receipt, or by any other evidence, oral or documentary, sufficient to satisfy the court or jury of the fact of payment.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Affirmed.*

Albert S. Story and *George A. Magney,* for appellant.

George W. Cooper, contra.

ROOT, C.

Plaintiff resided in Pawnee county from 1882 until the summer of 1890, when he moved to Omaha. In 1904 the

treasurer of Pawnee county sent to defendant, who is the treasurer of Douglas county, a distress warrant for the collection of plaintiff's personal taxes for 1886, 1887, 1888, 1889 and 1890. Plaintiff claimed the tax for 1890 was void, and that he had paid the taxes for the other years recited in the warrant, and instituted this action to enjoin the collection of said taxes. The district court found that the tax for 1890 was valid, and dismissed the petition as to said year, but that plaintiff had paid all other taxes assessed against him in Pawnee county, and enjoined defendant from collecting them. Defendant appeals.

1. Defendant first complains that the court overruled his motion to compel plaintiff to make his petition more specific, by stating "to whom said payments were made, and from whom said receipts were taken, also the time when paid and receipts taken." If defendant was not entitled to have the motion sustained *in toto* the court did not commit reversible error. *McDuffie v. Bentley,* 27 Neb. 380; *Hudelson v. First Nat. Bank,* 56 Neb. 247. We do not think the dates plaintiff paid the taxes are material; nor, had he alleged payment on specific dates, would the court have excluded evidence of payment on other days. The material fact was the payment, and not the date or dates when paid. *Demuth v. Daggy,* 26 Ind. 341; *Cranor v. Winters,* 75 Ind. 301; *Swett v. Southworth,* 125 Mass. 417; *Goss v. Calkins,* 164 Mass. 546. Nor would the dates of any receipts taken by plaintiff be material. Payment would liquidate the demand of the public, whether receipts were issued or not. Nor was it necessary to plead the name of the individual to whom payment was made. The public could only act through the instrumentality of officers and agents, and the burden would be upon the plaintiff to not only prove the payment of money, but also payment to some person authorized by law to receive the same. The name of the agent need not be stated in the pleading. *Lee v. Minneapolis & St. L. R. Co.,* 34 Minn. 225; *Todd v. Minneapolis & St. L. R. Co.,* 37 Minn. 358.

There remains only the allegation of the place of payment to be considered. Whether defendant, had he confined his motion to this one point, would have been entitled to that information, we do not say, but, considering the motion altogether, it was not reversible error for the court to rule as it did.

2. Defendant claims the evidence will not sustain the finding of the trial court, and we must confess we are not well satisfied with the record on this point. Plaintiff testified his poll tax was worked out for all the years of his residence in Pawnee county, and that he received receipts evidencing that fact; that he paid his personal taxes for 1886, 1887, 1888 and 1889 to delinquent tax collectors, but he is unable to give the names of the persons to whom the money was paid, or to say whether they were deputy treasurers or deputy sheriffs, nor can he state the amounts paid by him. Plaintiff also testified that the person who collected from him also collected delinquent taxes from other individuals. Plaintiff further testified that he received receipts for the taxes paid; that in 1894 he received notice from the county treasurer of Pawnee county that he had not paid all his personal taxes in that county, and that he answered said letter; that soon thereafter a deputy county treasurer of Douglas county came to him with a statement or notice about this tax; that he then hunted up his tax receipts, and exhibited them to said official, and satisfied that official, who then returned the statement; that thereafter he moved some three times, and that he and his family boarded some two years, during which time his household effects were packed and stored in a warehouse; that after the presentation of the warrant issued in 1904 he and his wife made diligent search, but were unable to find the receipts. Plaintiff is corroborated by his wife as to the receipts and their loss, but neither witness is able to state how many receipts there were, or their form, or recitals, except that they were tax receipts. On the other hand, the tax lists in Pawnee county indicate that said taxes were not paid,

although they show that two distress warrants, including the one referred to in the petition, had been issued for the collection thereof. The first one issued was not exhibited on the trial, nor was any evidence given to apprise the court what, if any, return was made thereto. However, plaintiff and his wife seem to have been candid witnesses. The receipts having been lost, had the witnesses been so inclined, they could have testified to exact dates and amounts, so as to make their testimony more definite, and we are convinced they were honest and truthful in their statements. Again, the evidence is undisputed that Dr. Keys sold, not only his house, but the furniture therein, when he moved from Pawnee City, and that he remained in said city some months after said sale, closing up his business and making collections. If the county officials had been at all diligent, they could have levied on this personal property for the delinquent tax, and in all probability plaintiff could have produced much more satisfactory evidence then of his payment than he could or did 14 years thereafter.

We are well aware of the rule that the laches of tax collectors will not release the perpetual lien of unpaid taxes, nor will mistakes of public officials satisfy an unpaid general tax, but all the facts and circumstances shown by the record justified the trial court in considering the somewhat uncertain evidence in the record as proof of payment. It is well established that parol evidence will be received to show the payment of taxes. 2 Cooley, Taxation (3d ed.), p. 807; *Keesling v. Powell,* 149 Ind. 372; *Adams v. Beale,* 19 Ia. 61; *Hammond v. Hannin,* 21 Mich. 374; *McDonough v. Jefferson County,* 79 Tex. 535, 15 S. W. 490; *Richards v. Hatfield,* 40 Neb. 879.

We are satisfied defendant's assignments of error are without merit, and we therefore recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FRED KRAUS, APPELLEE, V. O. A. CLARK, APPELLANT; ADDIE CLARK, APPELLEE.

FILED APRIL 23, 1908. No. 15,170.

1. **Trial:** RIGHT TO OPEN AND CLOSE. "In the trial of a case the party first required to produce evidence is entitled to open and close the argument." *Zweibel v. Myers*, 69 Neb. 294.
2. **Appeal:** VERDICT: CONFLICTING EVIDENCE. Where testimony is conflicting, and it is fairly submitted to the jury, a new trial will not be granted if there is evidence enough to sustain the verdict, even though this court might differ with the trial judge and the jury as to the weight of the evidence.
3. **New Trial:** NEWLY DISCOVERED EVIDENCE. A new trial will not be granted upon the ground of newly discovered evidence, where such evidence is merely cumulative, and would not in all probability affect the result, if a new trial were granted.
4. ———: DILIGENCE. Where a party forgets the presence of a witness to an important conversation until after the trial, he cannot obtain a new trial on the ground of newly discovered evidence, relying upon the testimony of such witness.
5. **Evidence** in this case examined, and *held* sufficient to sustain the verdict of the jury.

APPEAL from the district court for Sherman county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

R. J. Nightingale, for appellant.

A. Wall and *R. H. Mathew, contra.*

ROOT, C.

Suit for balance alleged to be due plaintiff from defendants, who are husband and wife, for wages earned by plaintiff's minor son while in defendants' employ. Plain-

tiff recovered judgment for $34.50 against O. A. Clark, and said defendant appeals.

The errors assigned may be properly grouped under three heads: (1) That the court erred in permitting plaintiff to open and close the case; (2) that the evidence is insufficient to support the verdict; and (3) in refusing to grant a new trial for newly discovered evidence.

1. The allegations in the pleadings are somewhat indefinite, and in consequence the issues are not clearly joined, but we are satisfied from an inspection of the transcript that the burden was on plaintiff to prove the contract of employment as against defendant Addie Clark, and, as to defendant O. A. Clark, to prove the length of time the boy worked for him. Before any testimony was introduced defendant O. A. Clark demanded that he be given the opening and closing of the case, and the court overruled his request. After the evidence was all in said defendant was given permission to amend his answer, so as to exclude therefrom a denial, but we cannot ascertain from the transcript that the amendment was made, nor do we think it would have changed the rights of the parties in this particular. The right to open and close a case is governed by the state of the pleadings at the commencement of the trial, and not by admissions made in court during the trial. Code, sec. 283; *Zweibel v. Myers*, 69 Neb. 294; *Omaha & R. V. R. Co. v. Walker*, 17 Neb. 432.

2. If the jurors believed plaintiff's testimony there was ample support for the verdict. A verdict for defendant would also be justified from a consideration of all the evidence. The transcript does not contain a copy of the instructions, so we assume that they were fair and properly submitted the law of the case. The verdict is not so manifestly wrong and against the clear weight of the evidence as to justify us in granting a new trial on that ground. *Darcy v. Darcy*, 73 Neb. 726.

3. The newly discovered evidence is the testimony of a boy, Kisling, who claims to have been present about

Christmas at a pond upon his father's farm, when Clark was loading ice, and there heard a conversation between plaintiff and defendant. The parties admit they were talking at said time and place, but do not agree concerning what was said. Plaintiff testified that he demanded money from defendant, and told him not to pay any money to his son Charles; whereas defendant testified that nothing was said about not paying to the son, only a demand for payment, and Kisling corroborated defendant. Defendant says he did not know the boy's name, and had forgotten till after the trial that a boy was present during said conversation. The testimony would contradict plaintiff, but is cumulative merely. Defendant admits plaintiff was sharply insisting on payment. He does not deny plaintiff's testimony that three weeks after the interview at the pond plaintiff again demanded payment, and that defendant told him there was a balance of $34.50, and offered to pay it to plaintiff, but plaintiff refused to settle that way. Soon thereafter defendant paid this balance to the minor son by a check, payable not to the father, but to the son. We cannot say the admission of Kisling's testimony would have changed the verdict, nor can we hold defendant was diligent in securing the evidence. The case had been tried in the county court, so defendant was advised as to the testimony he would face in the district court. If Kisling was present to assist in loading the ice, as he says he was, defendant must have seen him, and inquiry of the owner of the land would have developed the name of the boy. The fact that defendant forgot that the boy was present will not warrant sending this case back for a new trial. *Bowman v. Clemmer,* 50 Ind. 10; *Munn v. Worrall,* 16 Barb. (N. Y.) 221; *Parkins v. Missouri P. R. Co.,* 79 Neb. 788.

A careful consideration of the record will not disclose reversible error, and we therefore recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MATT JOYCE, APPELLANT, V. BEN P. MILLER ET AL., APPELLEES.

FILED MAY 7, 1908. No. 15,192.

1. Appeal: EVIDENCE. The admission of immaterial evidence is not reversible error unless it is shown to have in some manner prejudiced the rights of the complaining party.
2. ———: INSTRUCTIONS. An instruction which responds to the issues made by the pleadings and is predicated on the evidence cannot be successfully assailed by the defeated party.
3. ———: ———. It is not error to refuse an instruction requested in behalf of either party to a cause where the subject matter of the instruction is fully stated and explained in the charge of the court to the jury.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Hugh La Master, for appellant.

S. P. Davidson, contra.

BARNES, C. J.

This was an action brought in the district court for Johnson county to recover the purchase price of a lot of range horses. The plaintiff, who resides in the state of Idaho, alleged in his petition, in substance, that on the 25th day of August, 1902, and for some time prior to that date, the defendants were engaged in the business of buying western horses and shipping them to eastern points for sale; that the business was conducted mainly by the defendant Ben P. Miller, but that Minnie A. Miller was interested therein; that on the said day the defendants

purchased from the plaintiff a number of horses for the agreed price of $1,274, which was also their actual value; that at said time the defendants, acting through Ben. P. Miller, stated and represented to plaintiff that they had a much larger sum than $1,274 on deposit in the Chamberlain Banking House of Tecumseh, Nebraska, and that said bank was solvent and a reputable banking institution doing a general banking business in said state; that at said time defendants knew that each and all of said representations were false, and they were made for the purpose and with intent of obtaining plaintiff's property, and thereby defrauding and cheating him; that each of said representations was wholly false and fraudulent; that the defendants had no money whatsoever on deposit in said bank, and had no credit there; that said bank was then wholly insolvent, and was about to go into the hands of the state banking board of the state of Nebraska; that the insolvency was fully known to the defendants; that for the purpose of getting possession of said horses the defendants gave a check to the plaintiff on said bank for $1,274, signed by Ben P. Miller in the name of M. A. Miller; that plaintiff believed the representations of the defendants, and relied thereon, and accepted said check and delivered the possession of said property to the defendants; that defendants took the same, intending not to pay the plaintiff therefor, and intending to cheat and defraud him out of the purchase price of said horses; that the check was duly presented in the usual course of business to the Chamberlain Banking House, but was not paid, but was protested, and the same has never been paid, nor has plaintiff received anything for his said horses. Defendant Ben P. Miller admitted the purchase of the horses; denied the other allegations of the plaintiff's petition, and pleaded, among other things, a discharge in bankruptcy as a defense to the action. Minnie A. Miller, by her answer, denied that she was in any way connected with the transaction; admitted that the check in controversy was signed by the defendant Ben P. Miller in the name of M. A. Mil-

ler; alleged that the plaintiff well knew that Ben P. Miller was acting for himself; that she was a married woman living with her husband; that the check was not signed nor the indebtedness incurred in reference to or upon the faith and credit of her separate estate, and therefore that she was in no way liable for the indebtedness sued upon. The plaintiff, by his reply to the separate answer of the defendant Minnie A. Miller, alleged that she was an undisclosed principal at the time said contract was entered into, and that thereafter he learned of her interest therein; admitted that she was the wife of defendant Ben P. Miller; and alleged that the indebtedness was incurred in reference to and upon the faith and credit of her separate estate. The plaintiff further alleged that, having allowed the defendant Ben P. Miller to transact the business in her name, she was estopped to deny her liability in the transaction complained of. A trial was had, which resulted in a verdict and judgment for both defendants, and the plaintiff brings the case here by appeal.

The plaintiff now concedes that the discharge in bankruptcy of the defendant Ben P. Miller, which was pleaded as above stated and was duly proved upon the trial, was sufficient to authorize a judgment in his favor. So we may consider the case disposed of, so far as it relates to any liability on his part. The plaintiff contends, however, that he should have recovered a judgment against the defendant Minnie A. Miller, and alleges that the district court erred in receiving evidence of the manner in which the defendant Ben P. Miller conducted his business after the failure of the Chamberlain Banking House. It must be remembered that plaintiff's main contention on the trial below was that the manner in which Ben P. Miller conducted his business with the Chamberlain Banking House at the time of the purchase and sale of the horses in question showed that his wife had a pecuniary interest therein, and was in fact an undisclosed principal in the transaction. To prove that the wife had no direct interest therein, and to rebut any presumption of

fraud, the defendants introduced the evidence complained of. While this evidence was not very material, it is impossible for us to imagine how it could have been at all prejudicial to the plaintiff. It is true that immaterial evidence should not be received, but its reception does not constitute reversible error, unless it is shown that it in some manner prejudiced the rights of the complaining party.

It is further contended that the court erred in admitting evidence that a telegram was sent by a son of the defendants from Grand Island, Nebraska, to the banker at Nampa, Idaho, informing him and the plaintiff that the Chamberlain Banking House had failed, and that the horses were in Grand Island. Complaint is also made because the defendants were allowed to prove that the railroad men at Grand Island would not deliver the horses until the defendants' son signed a release for them; that they told one Palmer, who purchased a part of the horses, that there was something wrong with them; that a lawyer was thereupon consulted, and the horses were thereafter sold. This evidence is in the same class with that which has just been considered. At most, it was only an explanation of the manner in which the shipment of horses was handled and disposed of, and, while it might have been rejected without error, its reception could not prejudice the plaintiff's substantial rights.

Plaintiff also contends that the court erred in giving instruction No. 4, asked for by the defendants, and the criticism on that instruction is that it was thereby made incumbent upon the plaintiff to have had knowledge of the interest of Minnie A. Miller in the transaction at the time it occurred, and that it further stated to the jury that, if the transaction was not had in view of or upon the faith and credit of her separate estate, she was not liable. An examination of the instruction, which is found in the record, shows that this criticism is not well founded. By it the jury were told, in substance, that, if they believed from the evidence that the Chamberlain

Banking House authorized Ben P. Miller to draw checks aggregating in amount not exceeding $4,000 on said bank in the name of Mr. M. A. Miller, that Ben P. Miller transacted the business relating to the purchase of the horses in controversy in the name of M. A. Miller, and that plaintiff was not in any way misled into the belief that he was doing business with Minnie A. Miller, and they should further believe from the evidence that the defendant Minnie A. Miller had no knowledge of the transaction in controversy, and had no interest in it whatsoever, they should find for her, provided they should further find from the evidence that she was a married woman, and the transaction in controversy was not had in view of or upon the faith and credit of her separate estate. It seems to us that this instruction fairly responded to the issues in the case. An examination of the record discloses that there was no substantial conflict of evidence upon any question except that of fraud. The plaintiff and one Mock, a banker at Nampa, testified that the defendant Ben P. Miller at the time he made his purchase represented that he was a man of means; that he had on deposit with the Chamberlain Banking House more than $4,000, and that institution was one of the strongest banks of the country; that he presented a letter of credit for $3,000 issued by the bank at the time he made his check to pay for the horses in question, and that one Taylor was present at that conversation. The defendant Ben P. Miller testified that he purchased 250 head of horses from the plaintiff on the 16th of July, 1902; that the plaintiff was unable at that time to deliver more than 150 of them; that he went into the bank at Nampa with the plaintiff and presented his letter of credit, wherein the Chamberlain Banking House had stated that Mr. M. A. Miller was entitled to draw checks on that institution to an amount not to exceed $4,000; that the banker took the letter and went to a book he had in the bank, evidently for the purpose of looking up the standing of the Chamberlain Banking House, came back, and in-

formed the plaintiff that the matter was all right, and defendant's check for the price of the 150 head of horses was good; that the check so given by him was paid in the due course of business; that the arrangement then was that, when the balance of the horses which he had purchased were ready for delivery, the plaintiff was to notify him of that fact; that he received such notice in the latter part of August, and went to Nampa to receive the horses; that they were delivered to him by the plaintiff, and at that time he had a letter of credit from the Chamberlain Banking House authorizing him to draw checks on that institution to the amount of $5,000; that the banker at Nampa examined his letter of credit, told the plaintiff that his check to pay for the horses was good, and that he thereupon drew and delivered it to the plaintiff, and had the amount of it indorsed on said letter. He further testified that at that time he had no knowledge, suspicion or belief that the Chamberlain Banking House was about to fail, but supposed it was entirely solvent; that he had no notice of its failure until his return to Nampa, some ten days later, from a trip in the mountains, when he was told by Banker Mock and the plaintiff that the Chamberlain Banking House had failed, and that they had received a telegram from his son stating that fact, and that the horses were at Grand Island. He also testified that his wife Minnie A. Miller had no interest in the transaction whatever, and in fact knew nothing about it. His evidence was corroborated by the testimony of the witness Taylor, and we have no hesitancy in saying that, as applied to the evidence, the instruction complained of was a correct statement of the law.

Plaintiff also claims that the court erred in refusing to give instruction No. 13, tendered by him. We have examined all of the instructions, and find that the propositions contained in that request were submitted to the jury by other instructions given them by the court, and so the request was properly refused.

Finally, it is contended that the court erred in giving defendants' instruction No. 3. It is claimed that by it the jury were told that the giving and acceptance of the check in question was a payment for the horses. This criticism is not well founded. We find that the statement contained in that instruction was, in substance, that, if the jury should find by a preponderance of the evidence that the check was in fact received as payment for the horses, they should find for the defendant.

We have carefully read the whole record, and are satisfied that the verdict is amply sustained by the evidence. The fact is that the plaintiff failed to show that the defendant Minnie A. Miller had any interest in, or knowledge of, the transaction complained of; that she was guilty of any fraud or misrepresentation, or that the credit was extended to Ben P. Miller on the faith of her separate estate. In short, the record conclusively shows that she was not known by the plaintiff, and there is no competent evidence in the record which even tends to show that she was an undisclosed principal in the transaction. Again, we are satisfied that there was no fraud practiced in the original purchase and sale of the horses, and, but for the failure of the Chamberlain Banking House, the plaintiff would have received his money by the payment of the check given him by the defendant Ben P. Miller; that, but for the discharge in bankruptcy of the said defendant, plaintiff would have secured a judgment against him, which was all the relief his evidence entitled him to receive.

Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

ARTHUR R. LEEDOM V. STATE OF NEBRASKA.

FILED MAY 7, 1908. No. 15,451.

1. **Criminal Law:** INFORMATION: ELECTION. The information charged the defendant, a male person over 18 years of age, with having had illicit carnal intercourse with the prosecutrix, a female child under the age of 18 years, and not previously unchaste, on the 20th day of July, 1906, and upon various times and occasions subsequent to that date, and up to and including the month of November, 1906. On motion of the defendant the prosecutor elected in open court, and in the presence of the jury, to proceed to the trial and rely for a conviction upon the act of intercourse alleged to have occurred on the 20th day of July, 1906, as the substantive crime charged. *Held*, That the jury could not have been misled as to the specific charge submitted to them for their consideration.

2. ———: CORROBORATIVE EVIDENCE. Letters written by the defendant to the prosecutrix subsequent to the date of the crime charged in the information, and at a time when he was keeping her in a hospital awaiting her confinement, in which he spoke of her pregnancy and acknowledged himself to be the author of her unfortunate condition, were properly admitted in evidence as tending to corroborate her testimony on the question of the specific charge contained in the information.

3. ———: EVIDENCE. In such cases, evidence of other acts of sexual intercourse between the defendant and the prosecutrix, related in time, and subsequent to the act specifically charged in the information, is admissible for the same purpose.

4. ———: INSTRUCTIONS. Error cannot be predicated on the giving of an instruction which does not purport to cover the whole law of the case, when such instruction, read and construed with the rest of the charge, correctly states the law applicable to the evidence.

5. **Rape:** INSTRUCTIONS: CHASTITY. It is not necessary in a case of statutory rape for the court to charge the jury that, before a conviction can be had, the evidence of the prosecutrix that she was not previously unchaste must be corroborated. It is sufficient if the court instructs the jury that in such cases they must be satisfied by the evidence, beyond a reasonable doubt, that the prosecutrix was not unchaste previous to the act complained of.

6. ———: EVIDENCE. Evidence on the part of the state of the good reputation of the prosecutrix in the community where she lived

is not admissible in the first instance; but, where the defendant produces evidence assailing her character and tending to establish an act of lewdness on her part, evidence of her previous good character for chastity may be introduced to discredit such testimony.

7. **Criminal Law: INSTRUCTIONS.** It is not error to refuse instructions requested by the defendant where the court on his own motion has given the substance of such requests.

ERROR to the district court for Boone county: JAMES R. HANNA, JUDGE. *Affirmed.*

H. C. Vail and *A. E. Garten,* for plaintiff in error.

W. T. Thompson, Attorney General, Grant G. Martin, John C. Wharton and *O. M. Needham, contra.*

BARNES, C. J.

At the October, 1907, term of the district court for Boone county an information was filed against one Arthur R. Leedom, hereafter called the defendant, charging in substance that in said county and in the state of Nebraska, on the 20th day of July, 1906, and upon various times and occasions subsequent to that date, and up to and including the month of November, 1906, the defendant, a male person of the age of 18 years and upwards, did assault and carnally know one Edith F. Mathews, a female child under the age of 18 years, and not previously unchaste. The defendant by demurrer challenged the sufficiency of the information on the grounds of duplicity and a misjoinder of offenses. The demurrer was overruled. Thereupon a plea of not guilty was interposed. A jury was impaneled, the trial proceeded, and, when the state commenced to offer its evidence, counsel for the defendant moved *ore tenus* that the prosecutor be required to elect upon which of the several offenses charged in the information he would proceed to trial and rely for a conviction. The record discloses that, thereupon, the following proceeding took

place: "By the Court: As the court understands the information, the time is fixed the 20th day of July, 1906, and any further dates referred to therein are offered only as corroborative proof of the crime charged as having taken place on the 20th day of July, 1906. With that statement as to the understanding of the court, the motion to elect may be overruled. Exception. By Mr. Vail: There has been no statement made in open court that the state is prosecuting for the statutory crime committed on the 20th day of July, 1906, and the information filed herein alleges a continuing offense from the 20th day of July, 1906, on various occasions subsequently to that date up to and including the month of November, 1906, and the defense at this time insists that it is fair to the defense to know from the lips of the state's attorney or those representing him that the state is only prosecuting on the charge of statutory rape alleged to have been committed on the 20th day of July, 1906. By the Court: The statement made by the court was based upon the argument of the counsel for the state made on this information, but the record may now show exactly what the state is contending for. The counsel for the state may state what their claim is in that regard. By Mr. Needham: The state will elect to stand upon the act of intercourse as occurring on or about the 20th day of July, 1906, in so far as that is the substantive crime is concerned. We will insist that we have a right to prove any acts after that as corroborative evidence. By Mr. Vail: The defendant at this time insists that the state be specifically limited to the 20th day of July, 1906. By the Court: As to these matters of corroborative evidence we will meet them when we come to them. The objections may be overruled. Exception." Thereafter the trial proceeded upon the theory thus outlined, and finally resulted in the following verdict: "We, the jury, duly impaneled and sworn in the above entitled cause, do find the defendant, Arthur R. Leedom, guilty in manner and form as charged in the information." The court, after

overruling defendant's motion for a new trial, sentenced him to imprisonment in the penitentiary for a term of six years, and he has brought the case here for review.

The defendant first contends that the information charged him with the commission of several separate, distinct and substantive crimes; that the jury were not advised or informed which one of the several offenses was submitted to them for consideration; that, therefore, some of the jurors might have found him guilty of one of said charges and others of some other offense, all of which was prejudicial to his rights, and he is, therefore, entitled to a new trial. We are constrained to say, however, that we do not so understand the record. That each act of sexual intercourse between the defendant and the prosecutrix was a separate and distinct crime, there can be no doubt; and, while we do not approve of the charging part of the information, yet, under the rule announced in *Lanphere v. State*, 114 Wis. 193, the form of the charge furnishes no ground for a reversal of the judgment in this case. It was there said: "The failure of the court to strike from the information the useless words, 'and on divers other days and times between the said 4th day of August and the 1st day of September, A. D. 1898,' was not prejudicial to the rights of the accused. The words were mere surplusage. The naming of a day certain was essential, and that was satisfied." The information there was like the one in the case at bar, and the court treated the words, "and on divers other days and times between said 4th day of August and the first day of September, A. D. 1898," as mere surplusage, and not at all prejudicial to the rights of the accused. Again, we think it may be said, strictly speaking, that the information charges but one offense, to wit, that of July 20, 1906. No other date, time or place is alleged, and yet, if we were at all in doubt as to whether or not the defendant was prejudiced by the form of the information, the rulings of the court thereon, or the manner in which the trial was conducted, we would not hesitate to reverse the judgment

and grant the defendant a new trial. It appears, however, in addition to what has already been said, that in open court, and in the presence of the jury, the prosecuting attorney elected to, and stated that he would, rely on the charge of July 20, 1906, and none other, for conviction. As above stated the trial proceeded on that theory and with that understanding. The state made its proof of the crime committed on that date, and introduced no evidence as to the date of any other or different offense, and it seems to have been clearly understood by the court and jury that the evidence, such as it was, of other acts of a like nature between the defendant and the prosecutrix, of her pregnancy, and the letters written to her by the defendant acknowledging himself to be the author of her unfortunate condition, were introduced for the sole purpose of corroborating her testimony as to the principal and specific charge contained in the information. It further appears that the court, in one of the instructions, told the jury that, if the prosecutrix had ever had unlawful, voluntary sexual intercourse with a male person before *the act* complained of, then she was not chaste within the meaning of the law, thereby directing their attention to the single and specific charge upon which the defendant was being tried. We think it clearly appears from the record that the jury could not have been misled in this case. Indeed, we may say that no one of ordinary intelligence could have had any doubt as to the particular charge that was submitted to the consideration of the jury.

It is next contended that the district court erred in admitting the letters of the defendant to the prosecutrix, designated as exhibits "A," "B," and "C," in evidence, for the reasons stated in the objections thereto at the trial, which read as follows: "The defendant objects to the introduction of exhibits A, B, and C offered by the state, for the reason that the state has elected to rely upon the alleged act of intercourse of July 20, 1906, and there is no evidence in the record that the pregnancy testified to

in this action was the result of such act of intercourse, and there is no reference in the exhibits referring to any acts of intercourse on or about the date of July 20, 1906. The defendant objects to the introduction of any further evidence in regard to pregnancy, or the delivery of the child." It appears that the letters in question were written to the prosecutrix by the defendant while he was keeping her at a hospital in Council Bluffs, and later on at a place in Omaha, awaiting her confinement, and that they contained the incriminating admissions and statements above mentioned. It is argued by counsel that this evidence did not relate directly to the specific act of July 20, 1906. While this is true, yet they were admissible under the rule announced in *Woodruff v. State,* 72 Neb. 815. It was there said: "The fact, if it be one, that the evidence tends to prove another and independent crime does not necessarily determine its admissibility as evidence of the crime charged in the case at bar. The determinative question is, is it relevant and pertinent in establishing the offense charged, and does it throw some light on that controversy and assist in the ascertainment of the truth in respect of such charge? We feel confident in the correctness of our position in saying that it does; and, if believed, the evidence is corroborative of the ultimate fact sought to be proved; that is, the act of sexual intercourse as charged in the information." That this evidence was introduced solely for the purpose of corroborating the prosecutrix as to the principal fact of her having had sexual intercourse with the defendant on the 20th day of July, 1906, was well understood; and it, as well as other acts of the same kind, which were related in time, and took place subsequently to the one specifically charged in the information, was admissible for that purpose. *People v. Mathews,* 139 Cal. 527, 73 Pac. 416; *State v. Robertson,* 121 N. Car. 551, 28 S. E. 59; *Smith v. Commonwealth,* 109 Ky. 685, 60 S. W. 531; *Sykes v. State,* 112 Tenn. 572, 82 S. W. 185; *State v. Borchert,* 68 Kan. 360, 74 Pac. 1108.

It appears that the court on his own motion gave the jury the following instruction numbered 9: "You are instructed that under the law a girl under the age of 18 years is incapable of consenting to an act of sexual intercourse, and that in the prosecution for rape upon such a girl it is immaterial whether or not she gave consent to such sexual intercourse." Error is assigned for the giving of this instruction. It is argued that, as it omits to state that the prosecutrix must be under 18 years of age, and not previously unchaste, it was equivalent to telling the jury that her previous unchastity made no difference in the case. The rule is that it is the duty of a reviewing court to read all of the instructions and construe them together. By so doing, we find that the court did not attempt to state all of the law applicable to the case by the instruction complained of, but, on the contrary, the jury were elsewhere instructed: "Unless you believe, beyond a reasonable doubt, that Edith F. Mathews had sexual intercourse for the first time with this defendant, and never had sustained such relation with any other man than the defendant, you must find the defendant not guilty." We also find that this charge was repeated, in substance, in several other paragraphs of the instructions. So the defendant's contention on this point is not well founded.

Complaint is made of instructions numbered 12 and 13, not because of anything contained in them, but because they fail to state that there was no corroborative evidence that the prosecutrix was not previously unchaste. It is claimed that such corroboration was necessary. We are satisfied that such an instruction was not warranted by the evidence, and, further, we are not advised that any court has held such corroboration necessary. We have taken as advanced grounds on this question as any court by our former holding that the jury in such cases must be satisfied by the evidence, beyond a reasonable doubt, that the prosecutrix was not previously unchaste; yet we are now urged to go further and hold that her testimony

on that point must be corroborated by other competent evidence. The only case cited by counsel in support of this request is *Zabriskie v. State,* 43 N. J. Law, 640, 39 Am. Rep. 610. An examination discloses that the defendant in that case was prosecuted for seduction, and the statutes of that state, in effect, placed that burden upon the prosecution; therefore that case is not authority in cases like the one at bar. We are of opinion that the court did not err in failing and refusing to so instruct the jury.

By instruction numbered 17 the jury were told that the evidence as to the reputation of the prosecutrix in the community where she lived prior to July 20, 1906, was not admitted upon the issue involving her character, but only to discredit the testimony tending to establish the act of lewdness testified to in behalf of the defense. Complaint is made of the giving of that instruction. Authority for the admission of such evidence is not wanting. See *Woodruff v. State, supra,* and *State v. Prizer,* 49 Ia. 531. The evidence being admissible for that purpose only, and not to establish general reputation for good character, it was proper to so inform the jury.

Finally, the defendant contends that the court erred in refusing instructions numbered 7, 8, 10, and 11, tendered and requested by him. We have examined each of those requests, and find that some of them were properly refused because they were not a correct statement of the law, and that such as were correct in that respect were given by the court on his own motion. So we are satisfied that there was no error committed in giving and refusing instructions.

As we read the record, the fact of defendant's illicit intercourse with the prosecutrix on the 20th day of July, 1906, is not seriously questioned, and the only substantive defense interposed by him was her alleged previous unchastity. The defendant was given full opportunity to establish that fact if it existed. The jury, after hearing the evidence and being properly instructed by the

court on that point, resolved that issue against him, and we think rightly so. We are impressed with the fairness of the trial, and find no reversible error in the record.

The judgment of the district court is

AFFIRMED.

HEIRS OF MOSES SPEESE, APPELLEES, V. ESTATE OF JEREMIAH SHORES, APPELLANT.

FILED MAY 7, 1908. No. 15,101.

Descent and Distribution: SLAVES: INHERITANCE. Moses Shores first lived and cohabited with Fannie Shores, and there was born to them Jeremiah Shores, the appellant herein. He next cohabited with Hannah Webb, who departed this life in 1855, and to them was born Josiah Webb, whose estate is in controversy herein, and Moses Speese, now deceased. After the death of Hannah Webb, Moses Shores cohabited with Patsy Davis, and there were born to them John Wesley Shores, Mary Hauser and Elizabeth Stimpson. Patsy Davis departed this life in 1865 or 1866. The above parties were all slaves living in the state of North Carolina, where Hannah Webb and Patsy Davis died. In North Carolina slaves could neither legally marry nor own or inherit property. After the close of the civil war, Moses Shores and Fannie Shores lived and cohabited together as husband and wife, and afterwards moved to the state of Indiana, where they both died. Josiah Webb moved to Custer county, in this state, where he died leaving as his estate the land in controversy herein. Jeremiah Shores claims the estate or an interest therein as a half brother of the deceased. The children of Moses Speese, the full brother of the deceased, claim an interest in the estate, and John Wesley Shores, Mary Hauser and Elizabeth Stimpson also claim an interest therein as brother and sisters of the deceased of the half blood. The case was submitted to the court on the pleadings, which on behalf of the parties claiming as children of Hannah Webb and Patsy Davis alleges that these women were each legally married to Moses Shores. The appellant's pleading denies such legal marriages of these parties, and asserts that because Moses Shores and Fannie Shores, his father and mother, lived and cohabited together as husband and wife he became their legitimate child. *Held*, That looking to the pleadings alone, in the absence

of evidence, the children of Hannah Webb and Patsy Davis born of their union with Moses Shores must be regarded as illegitimate; that under our statute the estate of an illegitimate child descended to his mother, and in case of her death to her heirs; that the whole estate under our law would descend to Moses Speese, the full brother of Josiah Webb, if he were living, but because of his death his children were entitled to the estate as his representatives; that Jeremiah Shores, not being a relative of Hannah Webb, the mother of the deceased, was not entitled to any part of the estate, and the question of his being a legitimate or illegitimate child of Moses and Fannie Shores was immaterial, as he could not inherit in either event.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

J. R. Dean and *Hainer & Smith,* for appellant.

Sullivan & Squires, contra.

DUFFIE, C.

The subject matter in controversy in this case is the estate of one Josiah Webb, who died in Custer county, Nebraska, leaving as his estate a quarter section of land. This estate is claimed by the children of three different women, all having the same father. The case was submitted to the district court on the pleadings, and, from a judgment excluding Jeremiah Shores from any part in the estate, an appeal has been taken.

The facts as disclosed by the pleading of Jeremiah Shores, and from the statements of which his rights must be determined, are briefly these: All the parties involved are of African descent, and were slaves in the state of North Carolina until emancipated by the war of the rebellion. The relation of the parties is as follows: Moses Shores, the father of all the children, while in a state of slavery lived with one Fannie Shores as husband and wife, but whether they were married according to the custom prevailing among slaves or in any other manner is not known. Jeremiah Shores, the appellant, was a result of their cohabitation. Subsequently to the birth

of Jeremiah Shores, Moses, his father, cohabited with Hannah Webb, and as a result of that union there was born Josiah Webb, whose estate is in question, and Moses Speese, now deceased, but whose estate is represented by numerous heirs. At a still later date Moses Shores cohabited with Patsy Davis, and as a result of that union there were born John Wesley Shores, Mary Hauser and Elizabeth Stimpson. These various children of Moses Shores, under the custom which obtained in the slave states, each took the name of the master of their mother, and this accounts for the discrepancy in the names of the children of Moses Shores. The pleading of Jeremiah Shores charges the children of Moses Shores born to him from Hannah Webb and Patsy Davis as being illegitimate, while these children assert that they are the legitimate children of Moses Shores, and allege that Jeremiah is illegitimate. The court on the pleadings alone, in the absence of any evidence, found the following: "It appearing from the pleadings that Moses Speese was a brother of the deceased, that they had a common mother, and that John Wesley Shores, Mary Hauser and Elizabeth Stimson, the former a brother and the latter being each sisters of the deceased of the half blood, are entitled as a matter of law to inherit the land in question; it further appearing that Moses Speese is dead, and that his heirs are Susan Speese, his widow, William H. Speese, John W. Speese, Joseph Speese, Radford Speese, Sarah Taylor, Charles Speese and Earl Speese, his children, it is therefore ordered, adjudged and decreed that said heirs of Moses Speese together and jointly take and have an undivided one-fourth interest in said real estate." It does not appear from the pleadings that Moses Shores lived with any of the three women mentioned, except in the state of North Carolina, and it is distinctly charged that Hannah Webb and Patsy Davis both died in North Carolina, Hannah Webb in 1855, while a slave, and Patsy Davis soon after the close of the war of the rebellion. It is further alleged in the pleading of Jeremiah Shores that his father

and mother, Moses and Fannie Shores, lived together as husband and wife after their emancipation, and from this circumstance the claim is made on behalf of Jeremiah Shores that he became their legitimate child. We do not see how his being made legitimate can affect the case or give him any interest in the estate of Josiah Webb. In North Carolina slaves could neither legally marry nor own or inherit property. *Tucker v. Bellamy,* 98 N. Car. 31, 4 S. E. 34. Even in those slave states where a marriage custom among slaves prevailed, marriage was an obligation of such imperfect character that a separation of the parties at or before emancipation was deemed a divorce. As stated in 1 Bishop, Marriage and Divorce (6th ed.), sec. 163: "If the law takes cognizance of slave marriages, it must also of these slave divorces." In this view of the case, we are driven to the conclusion, looking at the pleadings alone upon which the case was tried, that the children born to the several women with whom Moses Shores lived in North Carolina were each and all illegitimate, and that the estate in question must be disposed of under our statute as the estate of an illegitimate child. *McDowell v. Sapp,* 39 Ohio St. 558; *Butler v. Butler,* 161 Ill. 451. Section 4932, Ann. St. 1907, is in the following language: "If an illegitimate child shall die intestate, without lawful issue, his estate shall descend to his mother, or, in case of her decease, to her heirs at law."

Josiah Webb, whose estate is in dispute, died intestate without lawful issue, and his mother departed this life many years prior to his death. He had a full brother, Moses Speese, who died many years previous to the death of Webb, and whose children are now claiming his estate. Moses Speese, if living, would take the estate, as he would be the only remaining heir of his mother, Hannah Webb, but as he is not living his children represent him and take as his representatives. We cannot see how John W. Shores, Mary Hauser or Elizabeth Stimpson have any interest in this estate under our statute, as their mother never was an heir of Hannah Webb, the mother of Josiah

Webb, whose estate is under consideration. Neither could Jeremiah Shores, the child of Fannie Shores, claim the estate, as his mother could not inherit from Hannah Webb, and whether he was legitimate or illegitimate is immaterial to the question in controversy. The fact that the court awarded an interest in the estate to the heirs of Patsy Davis is not a matter of which Jeremiah Shores can complain, as under no circumstances could he have an interest in the estate, and, as the children of Moses Speese, the legal heirs of Josiah Webb, make no complaint of the distribution made by the district court, the judgment of that court should be affirmed, and we so recommend.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SARAH F. GOOZEE, APPELLEE, v. HATTIE GRANT ET AL., APPELLANTS.

FILED MAY 7, 1908. No. 15,164.

1. **Adverse Possession: TACKING.** Where the owner of two contiguous lots of lands conveys one of such lots to A, and subsequently conveys the other lot to B, and a controversy arises between A and B concerning the boundary line between the two lots, A cannot, for the purpose of establishing title by adverse possession against B, tack his own possession to that of the common grantor.

2. **Boundaries: ESTOPPEL.** The owner of four lots built a fence around what he supposed were lots 1 and 2, and erected a dwelling house in about the center of said lots, in which he lived for about 20 years. He then sold and conveyed lots 1 and 2 to the defendant, and afterwards sold and conveyed lots 3 and 4 to the plaintiff. The evidence disclosed that the fence built by the former owner included a part of lot 3. *Held*, That plaintiff was not estopped to claim so much of lot 3 as was inclosed by the fence, no representation having been made to the defendant when she made her purchase that the fence did not include land other than lots 1 and 2.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Affirmed.*

John Grant and *Hoagland & Hoagland,* for appellants.

Wilcox & Halligan, contra.

DUFFIE, C.

From a stipulation entered into between the parties, it appears that lots 1, 2, 3 and 4 constitute the north half of block 98, in the city of North Platte. March 30, 1885, H. Otten became the owner of these lots by conveyance from Thomas Hughes. March 19, 1897, Otten conveyed lots 1 and 2 to Hattie Johnson, who has since intermarried with John Grant, and who, with her husband, are the defendants herein. May 4, 1898, Otten conveyed lots 3 and 4 to Milton Doolittle, receiver of the North Platte National Bank, and Doolittle as receiver of the bank afterwards conveyed said lots 3 and 4 to the plaintiff, Sarah Goozee. Shortly after the purchase of these lots Otten built a fence near the line between lots 2 and 3, and near the southwest corner of lot 2 he erected a barn, the west side of which is on a line with the fence. The fence and barn have stood where built up to the time of the trial. When Otten conveyed lots 1 and 2 to Hattie Johnson (now Hattie Grant), she went into possession of the property up to the fence and the west line of the barn, and has ever since been in continuous possession. Goozee went into possession of lots 3 and 4 on receiving her deed, and has been in possession up to the fence and to the west side of the barn on lot 2 up to the time of the trial. Otten took possession of the four lots constituting the north half of block 98 March 30, 1885, and maintained possession of the whole of the north half of said block up to the time when he conveyed lots 1 and 2 to Hattie Johnson in March, 1897. It is further stipulated that, soon after taking possession of the lots, Otten erected a dwelling house near the center of lots 1 and 2, and

occupied it as his home up to the time that he sold to Hattie Johnson, and that the strip in dispute between the parties lies immediately east of the line of fence and the west side of the barn heretofore mentioned. The land in dispute is a strip along the west side of lot 2, 2.47 feet on the north line, and 2.62 feet on the south line of said lot, it being 132 feet in length. The case was ejectment brought by the plaintiff to recover possession of the strip in dispute between the parties, and the trial was to the court without a jury. Judgment went in favor of the plaintiff, and defendant has appealed.

The evidence discloses that Otten, before building the fence above referred to, measured the width of lots 1 and 2, and erected the fence upon what he supposed was the true boundary line between lots 2 and 3. He located the west side of his barn on a line with the fence, and, as he supposed, on the southwest corner of lot 2. He also planted a row of trees east of the fence and near thereto. It is undoubtedly true that defendant, when she purchased lots 1 and 2, believed that these lots included all the land east of the fence, and that the barn stood wholly upon lot 2. A recent survey made before the trial discloses that the fence and barn include a strip off from the east side of lot 3 of the width above mentioned, and that Otten and Mrs. Grant were mistaken as to the true boundary line between lots 2 and 3. The claim made by the defendant that the rule relating to adverse possession should be applied to this case cannot be sustained. While Otten had inclosed a part of lot 3, and occupied it as his home for 20 years or more prior to the trial, he was also in possession of lots 3 and 4 during all that time, and could not, of course, hold adversely to himself. *Sluyter v. Schwab*, 73 Neb. 370. Neither can the claim of estoppel made on behalf of Mrs. Grant be sustained. While she and her grantor, Otten, may have believed that the fence and barn marked the true boundary line of the lots which she was purchasing, no express representation to the effect was made to her,

and her rights rest wholly upon the description contained in her deed which conveys lots 1 and 2 only.

The case is one of mistake as to the location of the true boundary line, and, the true boundary line being ascertained, the rights of the parties are fixed thereby. We recommend an affirmance of the judgment appealed from.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN R. ALLEN, APPELLANT, V. ESTATE OF ANDREW ALLEN, APPELLEE.

FILED MAY 7, 1908. No. 15,072.

1. **Limitation of Actions:** WAIVER. A stipulation in a promissory note providing, "And the payee or holder of this note may renew or extend the time of payment of the same from time to time as often as required, without notice, and without prejudice to the rights of such payee or holder to enforce payment against the makers * * * at any time when the same may be due and payable," is not an agreement to waive the bar of the statute of limitations.

2. **Pleading:** REVIEW: SUFFICIENCY. In determining the effect of a pleading, this court will give it a liberal construction whenever such pleading is attacked for the first time in this court, or where the parties go to trial in the lower court without objection upon a pleading thus assailed.

3. ———: JUDGMENT OF DISMISSAL. The petition shows upon its face that the notes sued on were barred by the statute of limitations. The answer alleged the bar of the statute as a defense. In reply the plaintiff alleges matters in avoidance of the defense pleaded. *Held*, In this state of the pleadings, appellant cannot urge that a judgment dismissing his action is not supported by the pleadings.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Burr & Marlay and *Samuel J. Tuttle,* for appellant.

John R. Dean and *Hainer & Smith, contra.*

EPPERSON, C.

The appellant seeks to recover upon two promissory notes given to him by Andrew Allen, since deceased. One note was given October 21, 1889, due six months after date, for $340. The other note was given November 6, 1889, for $260, due six months after date. Appellant filed his claim therefor against the estate of Andrew Allen, deceased, and later appealed to the district court from the order of the county court rejecting the claims. Upon appeal in the district court the appellant filed his petition setting forth the said notes, each of which contains the following provision: "The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and nonpayment of this note. And the payee or holder of this note may renew or extend the time of payment of the same from time to time as often as required, without notice, and without prejudice to the rights of such payee or holder to enforce payment against the makers, sureties and indorsers, and each of them, parties thereto, at any time when the same may be due and payable." The note last above described bears an indorsement of date April 11, 1894, of $187.25. For answer to the petition filed in the district court, the administratrix alleged "that the said indebtedness, if any there was, was long since paid by the said Andrew Allen in his lifetime, and there is nothing due and owing from the estate of the said Andrew Allen, deceased, to the said John R. Allen. Further answering the administratrix alleges that she does not admit that the estate of Andrew Allen, deceased, is indebted to the said John R. Allen in any sum whatever, but she alleges that if any such debt existed the same is barred by the statute of limitations, for the reason that more than five years have elapsed since the

pretended cause of action of the plaintiff accrued or the notes matured, and no suit was begun and no payment made on the notes sued on since the 16th day of April, 1894, and no promise to pay the same or acknowledgment of said debt in writing was ever made by said deceased in his lifetime or any one for him." In reply the appellant alleged, in substance, that said deceased and appellant were brothers; that said notes were given for money loaned to deceased by appellant, and that the said deceased was, and his estate is, estopped and barred from pleading the statute of limitations or claiming any right thereunder, for the reason that appellant by virtue of the contract had the right to, and did, extend the payment of said notes and each of them from time to time as often as required to prevent the running of the statute of limitations, and, further, that the deceased wrote the appellant letters in reference to the said notes, and, "among other things, in said letters deceased stated in relation to said notes, 'I don't want the limit of the statute to run out before settled,' deceased meaning that said two notes were not to become due until he paid them, meaning thereby to induce plaintiff not to commence an action upon the same, and that plaintiff would believe that the said deceased would not plead to the statute of limitations in any action that he might thereafter bring on said notes, and by both of which said contracts and by said letters plaintiff was induced to believe and did believe and relied thereon, and did not commence a suit at law against his brother, because he was led to believe that no plea or right under the statute of limitations would ever be pleaded, set up or claimed by said brother or by his estate if claimant relied upon said statements in said letters, together with the agreement set up in each of said notes; and claimant alleges that he did rely upon said agreement in said notes, letters and inducements therein contained, and the same did induce and lead claimant to forbear and defer an action on said notes and each one of them."

A trial in the district court resulted in a finding and

judgment for defendant. No motion for a new trial was filed, and therefore our inquiry here is limited to the one assignment of error that the pleadings do not support the judgment appealed from. The statute of limitations has barred an action upon the notes in controversy, unless, as appellant contends, the clause in each of the notes above quoted was a legal agreement made by the deceased not to plead the statute of limitations. This clause was a part of a printed form, and was intended apparently to fix the rights of the parties in the event that it should be signed by sureties and endorsers. It is not an agreement waiving the right to plead the bar of the statute. At most, it was effectual for the purpose of permitting the holder of the note to extend the time of payment without notice. Before such agreement will operate to toll the statute, it must appear that the holder of the note availed himself of the privilege given. The larger note contains an indorsement as follows: "Lincoln, Neb., March 5, 1905. In accordance with the within contract I hereby extend the time of payment of the within note for five years. (Signed) John R. Allen." The smaller note contains a like indorsement, except that it was dated in 1901, instead of 1905. Such attempts to extend the time for the payment of the notes are ineffectual. The agreement not being one to waive the bar of the statute, the notes were *prima facie* barred at the time of the attempted extension thereof.

But it is further contended by the appellant that a written extension of the time for payment was unnecessary; that, by reason of the right given the holder to extend the time of payment whenever necessary, the notes for this reason stand extended, or, in other words, remain unmatured so long as he forbears suing thereon. Such construction cannot be placed upon this agreement. Apparently it was not given this construction by either party. The indorsement made after the bar of the statute indicates that the appellant did not consider that the notes were extended automatically; and it ap-

pears that the maker did not so construe the contract, for in the reply immediately following the allegation above quoted we find the following: "Plaintiff often demanded payment thereof, and deceased was unable to pay said notes, and often requested delay and refused to pay the same, and each and every delay had in these premises was obtained by the said deceased at his earnest solicitation, and against the positive demand for payment by plaintiff." Appellant alleges in reply an estoppel by reason of a letter written by the maker of the note, which it is said induced him to refrain from bringing suit. This is new matter, and it is pleaded by way of an avoidance of the bar of the statute pleaded in defense. At most, the allegation of this estoppel is hardly sufficient to show that the plaintiff was overreached by the maker of the note, nor that he was induced by deceit to delay his action. The law of evidence required the plaintiff to prove this allegation of new matter. *Home Fire Ins. Co. v. Johansen*, 59 Neb. 348. It cannot be said that for this reason the pleadings here in controversy do not sustain the judgment.

As this action is against the estate of the maker of the notes, it is contended by the appellant that, inasmuch as the pleadings do not disclose the date of the maker's death, the answer does not sufficiently plead the statute of limitations. It is argued that, if the maker's death occurred before the statute would otherwise have barred the action, the running of the statute came to an end, and the plea is without weight. The reply is in the nature of an admission of the bar of the statute and an avoidance thereof by pleading, first, the extension of time for the payment of the notes by the maker from time to time; and, second, by pleading that the administratrix is estopped from pleading the bar of the statute by reason of a certain letter written to the appellant by deceased in his lifetime. In the reply appellant virtually admitted that the notes would have been barred by the statute were it not for the matters pleaded in avoidance. It

was then considered by the appellant as having sufficiently alleged this defense. Such effect must be given to it by this court. It is the rule that, in determining the effect of a pleading, this court will give it a liberal construction whenever such pleading is attacked for the first time in this court, and especially is this true where the parties go to trial in the lower court without objection upon the pleadings thus assailed. *National Fire Ins. Co. v. Eastern B. & L. Ass'n,* 63 Neb. 698; *Western T. A. Ass'n v. Tomson,* 72 Neb. 661; *Allen v. Dunn,* 71 Neb. 831. In order to give force to the appellant's contention, it would be necessary to hold that the answer totally failed to allege the bar of the statute as a defense. An insufficient allegation of this defense cannot be considered as a waiver thereof. *Prima facie* plaintiff's petition does not state a cause of action. The petition shows upon its face that the notes were barred by the statute. The answer alleged the bar of the statute, and the reply an avoidance. In this condition of the pleadings, appellant is not in a position to urge that the answer did not sufficiently plead the bar of the statute, nor that the pleadings fail to support a judgment dismissing his action.

The judgment of the district court is responsive to the pleadings herein, and we recommend that it be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SCHOOL DISTRICT NUMBER 30, APPELLANT, V. CUMING COUNTY, APPELLEE.

FILED MAY 7, 1908. No. 15,115.

1. **School Districts:** UNAUTHORIZED TAXES: VOLUNTARY PAYMENTS: DISTRIBUTION. Pursuant to the provisions of unconstitutional acts of the legislature, the county board of Cuming county levied taxes ostensibly for the benefit of the high school districts of that county, and the taxpayers voluntarily paid the same. *Held*, That such taxes constitute a public fund which may be distributed to the high school districts and other school districts of the county under the provisions of subsequent legislation.

2. ———: ———: ———: VESTED RIGHTS. A county has no vested right in a public fund created by the levy of taxes under the provisions of an unconstitutional act of the legislature for the benefit of high school districts and voluntarily paid by the taxpayers.

3. **Counties:** CLAIMS: DISALLOWANCE: APPEAL. When funds in the county treasury may be distributed only upon warrants authorized by the county board, a claim or demand therefor may be filed with the county board by the party entitled thereto, and an appeal may be prosecuted from an order rejecting the claim.

APPEAL from the district court for Cuming county: GUY T. GRAVES, JUDGE. *Reversed.*

A. R. Oleson, for appellant.

M. McLaughlin, contra.

EPPERSON, C.

The legislature of 1895 passed house roll No. 283, appearing as chapter 60, laws 1895, attempting thereby to provide free attendance at public high schools by nonresidents of high school districts but residents of the county. This act contained a provision for the payment of the expenses of high school pupils who were nonresidents of the district but residents of the county by the creation of a county school fund acquired by one mill levy upon all the property in the county other than the

property in high school districts. This act of the legislature was held unconstitutional in *Board of Education v. Moses*, 51 Neb. 288. In 1899 the legislature passed senate file No. 41, published as chapter 62, laws of 1899, and thereby again attempted to provide free attendance at public high schools of nonresident pupils. Section 4 of this act provided that the expenses therein contemplated shall be paid from the general fund in each county, and the county board were permitted annually to include in their estimate not to exceed one mill on the dollar to be levied and collected as other taxes. This act of the legislature was declared unconstitutional in *High School District v. Lancaster County*, 60 Neb. 147. Before each of these acts was declared unconstitutional, taxes had been levied and collected thereunder, and in some of the counties the funds so collected were still on hand when the acts were declared unconstitutional. The result was that the counties were in possession of funds which had been unlawfully collected. In 1905 the legislature passed two acts which are identical, except that they have different titles. These acts appear respectively as chapters 132, 133, laws 1905. Section 1 of each of these acts provides: "That all funds which have heretofore been paid into the treasury of any county for the maintenance of free high schools for nonresident pupils shall be paid to the school districts of such county which have maintained free high schools for nonresident pupils, proportionately to the number of nonresident pupils instructed and the length of time each pupil received such free instruction, provided that such sum shall not exceed seventy-five cents per week for each nonresident pupil so instructed." Other sections of the acts provide for the distribution of the surplus, and for the repeal of other sections, and need not be further noted here. After the passage of the acts of 1905 the appellant herein filed its claim with the county board of Cuming county, claiming its proportion of the fund in the county treasury of that county created under the provisions of the unconstitutional acts of 1895 and

1899. The county board rejected the claim, and the case was appealed to the district court, wherein the appellant filed its petition, alleging its existence as a high school district; and alleging that during the school year of 1899 and 1900 a number of pupils, naming them, nonresidents of the school district but residents of the county, attended its high school, "a total attendance by said persons of 552 weeks; * * * that said school district, having sufficient accommodations for said pupils, admitted them to said high school upon the faith of and in reliance upon said chapter 62 aforesaid, and allowed each of them the same privileges in said public high school as given to its resident pupils; that the cost and expense to said school district by reason of the attendance of such nonresident pupils aforesaid was in excess of 75 cents a week for each pupil during the whole time of their attendance, which expense was an additional burden upon said high school district in said amount each week," that the school board of said district reported such attendance to the county board, which caused to be levied a tax upon the property of said county for the purpose of paying for the tuition of such nonresident pupils under the provisions of chapter 60, laws 1895, and chapter 62, laws 1899; that there was realized from such levy the sum of $1,639.10, and out of which sum there has been paid for the purposes aforesaid for which it was levied the sum of $767.74, leaving a balance of $871.36; that such taxes were not paid under protest, nor had any taxpayer made application to have such taxes refunded; that the reasonable value of the accommodations furnished the pupils designated is the sum of 75 cents a pupil for each week in attendance; that by reason thereof the said school district is entitled to have paid out of such fund the sum of $414, none of which has been paid, and for which the appellant asks judgment against the appellee county. To appellant's petition appellee filed a demurrer for the following reasons: "(1) It does not state facts sufficient to constitute a cause of action. (2) The statutes upon which

this action is founded are unconstitutional and void. (3) The county board has no jurisdiction over the subject matter of this claim, and no jurisdiction was conferred on the district court by appeal." This demurrer was sustained, a judgment of dismissal entered, and the case brought here for review.

It is conceded that the county board had no authority to make the levies. But, having created this fund under color of authority for the purpose of supporting nonresident pupils in the different high school districts of the county, the questions arise as to whom the fund belongs, and did the legislature have authority to provide for its distribution to the high school districts. The fund was created by voluntary payments made by the taxpayers, and, not having been paid under protest, and no action having been brought for its recovery, it is a public fund. It is beyond the recall of the taxpayers. Under no provision of our statute can it be refunded to the persons contributing thereto. It must be noted that the legislature intended by the passage of the acts of 1895 and 1899 to raise revenue in addition to the amount otherwise required, or authorized by the then existing revenue laws, and it was expressly provided in the act of 1895 that the fund thus raised should be known and designated, not as a part of the county's general fund, but as a county school fund, and such apparently was the purport of the act of 1899, although there it referred to the levy as a part of the general fund of the county, instead of a school fund. Each of the acts under which this fund was thus illegally created provided that it should be for the benefit of the high school districts of the county in proportion to the attendance of nonresident pupils. The county treasurer was the collector of the funds, but the county board was to a certain extent the custodian thereof, or, in other words, it was to be paid out to the several districts upon the order of the county board. Had the act been constitutional, the legislature might as well have made the

county treasurer the distributor of this fund. This provision only made the county board the trustee or agent for the several high school districts. They made the levy. They put in operation the revenue system of the state for the purpose of realizing this fund. Although the acts were unconstitutional, the fact remains that the fund was created for the high school districts. The county has received money for them, and, having done so, the county board has no right to question the authority of the school districts to receive it. The fund exists because the several taxpayers, either through ignorance of their rights or indifference thereto, have yielded the amount thus levied; and they yielded it for the purposes for which the county board purported to levy it. They paid it to the county treasurer who under the law is the collector of all taxes within his county. It is a general rule that a tax collector must account for and pay over to the several municipalities for whom he collects all revenue entrusted to him, and, further, that it makes no difference whether the tax is legal or illegal. That is a matter in which he is not concerned, and although a tax be levied under the provisions of an unconstitutional act of the legislature, he must account to the public therefor.

In Cooley, Taxation (2d ed.) p. 705, it is said: "If he (the collector) receives the money to the use of the public, he should account for it; and it is immaterial that those who have paid it might successfully have resisted the collection from them. * * * The principles here stated are applicable not merely to the case of a defect in the official authority, but to the case also in which defects, either technical or substantial, might have been urged to the tax the officer has enforced. The substantial fact is that he has received money for the state, and, having done so, it is not his privilege to pause and question the right of the state to receive it; but he should pay it over, and leave those from whom it was received to present a claim to the state for the refunding, if they deny its right to retain it. Even an unconstitutional tax, once

collected, the officer has no right to retain, but he should account as in other cases." *O'Neal v. Board of School Commissioners*, 27 Md. 227, was an action to recover money due upon a levy for the benefit of school funds placed in defendant's hands for collection as collector of the county tax. Certain county charges had previously been paid by the commissioners out of the school fund. To reimburse the fund so expended $1,400 was levied by the county commissioners for the use of the school fund of the county. It was there held: "A tax collector who admits the collection of taxes will not be permitted to urge in his defense to a suit for their recovery that they were unlawfully levied." To the same effect are the following: *Smith v. Titcomb*, 31 Me. 272; *Village of Olean v. King*, 116 N. Y. 355; *Commonwealth v. City of Philadelphia*, 27 Pa. St. 497. In *Village of Olean v. King, supra*, it was held: "While a tax collector may decline to proceed in the collection of a tax illegally levied, as any person may refuse to recognize any illegal authority, or to obey an unconstitutional law, he may do so only for his own protection. Having collected a tax, he cannot then question the right of the proper authority to receive it, but must pay it over." The cases above cited, it is true, go to the liability of the tax collector to account for and turn over to the public the funds collected under an illegal act of the legislature, but the same reasoning undoubtedly applies to the county board, whenever the county, instead of a certain officer, is made the custodian of the fund. Had the high school district, or a city, or village made an illegal levy which was acquiesced in by the the taxpayer, can there be any doubt but that the district or municipality so making the levy could recover from the tax collector? What greater rights has the county? It is beyond the authority of the county board, after having created this fund illegally, and after the taxpayers have voluntarily contributed the same for the benefit of the high school district, to say that they will not pay it for the purpose for which it was intended. But it is urged

that, by permitting the appellant to recover herein, the legislature may indirectly accomplish what could not be done directly. We think that objection is not applicable to this case. While it is true that they would be turning over to the high school districts the fund in controversy, yet we must bear in mind that the illegal fund was created before the acts of 1905 were passed. The disposition of a public fund was the purpose of these acts, and they are applied to a public purpose.

Appellee contends that the county board had not original jurisdiction over claims of this character, and therefore the district court acquired no jurisdiction on appeal. It appears that the fund is in the custody of the county treasurer, held by him the same as county funds. In fact, the appellee contends that it is a county fund. There can be no doubt but that the only proper and legal process to remove it from the county treasury would be by warrant authorized by the county board. This being true, the county board had original jurisdiction to consider the appellant's claim. *Shepard v. Easterling*, 61 Neb. 882.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

By the Court: For the reasons appearing in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

JOHN A. DEMPSTER, APPELLEE, V. F. OPOCENSKY, APPELLANT.

FILED MAY 7, 1908. No. 15,177.

1. **Mutual Insurance Companies: SOLVENCY.** In determining the financial condition of an insurance company organized under the natural premium or mutual assessment plans, its probable income from premiums upon policies issued must be taken into consideration.

2. ———: CONDITIONS PRECEDENT. The statute does not make the procuring of securities, nor the depositing thereof with the state auditor, conditions precedent to the doing of business by an insurance company.

3. ———: CONTRACTS. Different writings taken together may constitute a single contract.

APPEAL from the district court for Knox county: JOHN F. BOYD, JUDGE. *Affirmed.*

E. A. Houston, for appellant.

O. W. Rice, W. L. Henderson and *Richard S. Horton, contra.*

EPPERSON, C.

In 1899 plaintiff was agent for the Bankers Reserve Life Association, and as such procured the defendant's application for $5,000 of insurance upon his life. With the application defendant gave to said association his certain promissory note for the first year's premium, payable in instalments after the delivery of the policy of insurance applied for. Although the policy was delivered promptly, defendant never paid any part of his note. It was sold and assigned to the plaintiff herein, who brought this action to recover the amount therein promised. Defendant alleged that plaintiff as agent for the association obtained the note through the fraudulent representations that the association was a good, reliable and solvent insurance company, and that it had complied with the statutes of this state relating to life insurance companies, and that said representations were false. The plaintiff admits the making of the representations alleged by defendant, but alleges that the same were true. A jury was waived, and a trial had to the court, resulting in a judgment for plaintiff, from which defendant appealed.

The defendant relies upon the statement filed by the association with the auditor of public accounts for the year 1899 to sustain his defense that the association was

not a good, reliable and solvent insurance company. It appears from this evidence that the association had on hand in cash or its equivalent $8,176.12; that there was due it gross premiums for the year 1899 and deferred premiums of the value of $2,395.79. The estimated premiums for the year 1900 for insurance then in force is estimated at $22,896.33. The liabilities consisted of death claims in process of adjustment amounting to $3,000. There was $15,275 due to officers or others for advances made in the organization of the association; also liabilities designated thus: "Promotion fund advances to expense fund for promotion fees since incorporation, to be repaid from said fund, ledger cash items $356.24; suspense account items $1,621.47." The association was organized in 1897 under the provisions of chapter 42, laws 1895, for the purpose of conducting a general life and accident insurance business upon the natural premium or mutual assessment plan. The evidence does not show that in 1899 it had a great amount of assets on hand over and above its contingent liabilities. But, considering the plan of insurance conducted by the association, it could not be expected to have accumulated within two years from its organization any great amount of surplus or reserve fund. The income from the payments of premiums upon policies of life insurance issued is necessarily relied upon by insurance companies as a source of revenue. It is the principal asset of companies organized under the plan adopted by the Bankers Reserve Life Association; and in determining the financial condition of such association its probable income from that source must be taken into consideration. The evidence in this case discloses that the insurance company was solvent.

Complaint is made that the company has no mortgages or other securities on deposit with the state auditor. The statute does not make the owning and depositing of securities a condition precedent to the doing of business by insurance companies organized on the natural premium or mutual assessment plans. It is only upon the

accumulation of moneys for the purpose of the fulfilment of its policies that such securities need be procured and deposited. Ann. St. 1907, sec. 6476. There is no evidence that the insurance company had accumulated such fund, and its failure to deposit such securities does not establish the fact that it is either insolvent or that it has violated the provisions of the statutes.

Complaint is further made that the association's articles of incorporation, its by-laws, and defendant's application are not attached to or incorporated in the defendant's policy, although the articles of incorporation provide that they are parts of the contract of insurance. This contention also is untenable. Different writings taken together may constitute a single contract.

We therefore recommend that the judgment of the district court be affirmed.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HENRY T. CHURCH, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED MAY 7, 1908. No. 15,167.

1. **Carriers:** TRANSPORTATION OF LIVE STOCK: BURDEN OF PROOF. It is the general rule that a common carrier of live stock for hire is an insurer of its safe delivery to the consignee, except where the injury or loss is due to the act of God, the public enemy, or to the inherent nature or propensities of the animals; and the delivery of the animals to the carrier in good condition and the failure of the carrier to deliver them at the place of destination makes a *prima facie* case against the carrier. The burden of proof is on the carrier to show that the loss resulted from some cause which would exempt it from liability.

2. **Appeal:** MISCONDUCT OF COUNSEL. A cause will not be reversed on account of misconduct of counsel in addressing the jury, where the attention of the trial court has been called to such misconduct,

and an objection thereto sustained and counsel duly admonished, unless it appears that such misconduct was of such a nature as to have been prejudicial to the rights of the adverse party notwithstanding the ruling and admonition of the court.

APPEAL from the district court for Red Willow county: ROBERT C. ORR, JUDGE. *Affirmed.*

W. S. Morlan, Frank E. Bishop and *Fred M. Deweese,* for appellant.

Starr & Reeder, contra.

GOOD, C.

In March, 1904, Henry T. Church contracted with the Chicago, Burlington & Quincy Railway Company to transport for him from McCook, Nebraska, to Menominee Falls, Wisconsin, a car-load of horses and mules. The contract of shipment did not require Church to furnish an attendant or caretaker. The horses and mules were delivered to the railway company in good condition, and when the car was received at its destination one mule was missing. Church was unable to obtain any information as to what had become of the missing mule. He brought this action against the railway company, setting up these facts, and asking for a recovery for the value of the mule. Defendant admitted its corporate existence, and denied all the other allegations of the petition. Upon a trial of the issues plaintiff had judgment, and defendant appeals.

Appellant's first contention is that the judgment is not supported by the evidence, and that a verdict should have been directed for the defendant. Upon the trial plaintiff introduced evidence tending to support all the allegations of his petition, and defendant introduced evidence tending to show that the horses and mules were unloaded near Chicago, at a station called Clyde, for feed, water and rest, and that at that time the mule in question was found dead in the car, with no evidence of external injury. The keeper of the yards at Clyde testified that the body

of the mule was badly bloated, and gave it as his opinion that the mule had been dead for 10 or 12 hours, and that it had died from colic. It does not appear that any post-mortem examination of the body was made. The evidence also tends to show that at that time the car was in sound condition, and that the other horses and mules were in good condition. It is inferable from the record that the car-load of horses and mules may have been unloaded at Creston, Iowa, where appellant maintains a yard where live stock in transit is unloaded for rest, feed and water. There is no evidence as to what care they received at Creston. Appellant contends that this state of facts requires a finding that the mule died from natural causes, or, at least, a finding that its death was not attributable to any fault or negligence on the part of the carrier. It is now the general rule that a carrier of live stock for hire is an insurer, except where injury or loss is due to the act of God, the public enemy, or to the inherent nature and propensities of the animals. This rule is modified frequently by special contract, where the shipper is required to furnish a caretaker. The rule is also recognized in many states that, where live stock is delivered to a carrier for shipment, the contract of shipment not requiring the consignor to furnish a caretaker, the burden of proof in the event of loss or damage is upon the carrier to show that the loss falls within one or more of the exceptions which would free the carrier from liability. In *Chicago, B. & Q. R. Co. v. Slattery,* 76 Neb. 721, it is held that a common carrier of live stock is generally an insurer of their safe delivery to the consignee against loss or damage, and the delivery of the animals to the carrier in good order and their arrival at the place of destination in bad order makes a *prima facie* case against the carrier, and it devolves upon the carrier to show that the loss or damage resulted from some cause which would exempt it from liability. *Chicago, R. I. & P. R. Co. v. Witty,* 32 Neb. 275. In *Coupland v. Housatonic R. Co.,* 61 Conn. 531, speaking of the carrier's liability it is said:

"While he is not an insurer against injuries arising from the nature and propensities of the live stock carried by him, yet his liability is not limited to a careful conveyance of the cars containing them. He must provide in advance suitable means to secure their conveyance, and he must use those means with all reasonable diligence and forethought in the varying circumstances arising in the business." In *South & North A. R. Co. v. Henlein & Barr,* 52 Ala. 606, 23 Am. Rep. 578, among other things, it is said: "By the common law a common carrier is absolutely liable for the safety of goods entrusted to him for transportation. Whatever loss or injury may happen, he must answer for, unless he shows it was caused by 'the act of God, or of a public enemy, or by the fault of the party complaining.' * * * When a loss or injury happens, the *onus probandi* rests on the carrier to exempt himself from liability, for the law imposes on him the obligation of safety. The owner or shipper is bound to prove no more than that the goods were delivered to the carrier, and the failure to deliver them safely. These facts are *prima facie* evidence of negligence or misconduct. * * * The rules of the common law prescribing his duties and fixing his liabilities are intended for the protection of the public, and it would offend the public policy, in which these rules have their foundation, if they were not extended so as to embrace every species of property which becomes the subject of transportation by carriers. * * * These are rights attaching to every species of property he may assume to carry, and the corresponding duty and liability the law fixes on him should also attach. We prefer, therefore, to follow the authorities, which hold that, unless modified by special contract, 'the common law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. Upon undertaking their transportation he assumes the obligation to deliver them safely against all contingencies, except such as would excuse the nondelivery of other property.'" In *Lindsley v. Chicago, M.*

& St. P. R. Co., 36 Minn. 539, it is held, in an action for the death of live stock in the course of transportation and wholly under the care of the carrier, that the burden of proof is upon the defendant to show that the cause of the death was within the exceptions qualifying its general liability. Under these authorities, which we think correctly state the rule, the burden of proof rests upon the appellant to show that the loss of the mule was due to the inherent nature or propensities of the animal. The cause of the loss is a matter to be determined by the jury from the evidence. *South & North A. R. Co. v. Henlein & Barr, supra.* Where the evidence shows that the animal was delivered to the carrier in good condition, and its death occurs while in the carrier's custody during transportation, these facts establish a *prima facie* case against the carrier, and raise the presumption of negligence on its part, and the burden rests upon it to free itself from the implication of negligence. Any other rule would place the shipper practically without any remedy in case of loss or damage to live stock occasioned by the negligence of the carrier. While the evidence offered tends to prove that the mule may have died without any fault on the part of the carrier, it is not of such a character as to necessarily require such a finding. For aught that appears in the evidence, the death of the mule may have been caused by lack of feed or water, or from overfeeding, or from lack of care upon the part of the appellant. Its death may also have been due to natural causes. The evidence does not go to the extent of proving that the death of the mule was not due to the negligence or fault of the company, and we cannot say that the evidence is not sufficient to sustain the verdict.

Appellant complains because the court refused to give an instruction directing a verdict for the defendant. The view heretofore expressed of the evidence is sufficient to dispose of this question.

Complaint is also made of instruction No. 4, given by the court upon its own motion, and of instruction No. 1,

given at the request of the plaintiff. Instruction No. 4 simply sets out the material allegations of the petition, which plaintiff was required to prove. Appellant criticises this instruction as permitting the jury to find a verdict for the plaintiff upon the proof of these facts alone, but such is not the case. It does not direct the jury to find a verdict upon the establishment of the facts therein contained, and was nothing more than pointing out to the jury the material facts in issue. Instruction No. 1, given at the request of the plaintiff, is in the following language: "You are instructed that, if you find by a preponderance of the evidence that the defendant company received the mule in question in good order at McCook, Nebraska, for shipment on through billing to Menominee Falls, Wisconsin, there to be delivered to the plaintiff, and that said defendant company failed to deliver said mule to the plaintiff at said city of Menominee Falls, Wisconsin, then you will find for the plaintiff, unless you further find by a preponderance of the evidence that the defendant's failure to deliver said mule to the plaintiff at said Menominee Falls, Wisconsin, was because of the death of said mule due to the act of God, or unavoidably resulting from the nature and propensity of an animal of that character." This instruction was a concise statement of the law applicable to the case, and properly placed the burden of proof upon the defendant to show that the loss was due to the act of God, or unavoidably resulted from the nature and propensities of the animal. It simply required the defendant to free itself from the presumption of negligence arising from the loss of the animal. We think the instruction was properly given.

Complaint is made because of alleged misconduct of counsel for the plaintiff in going outside of the record in his argument to the jury. The record discloses that counsel for plaintiff made statements in his argument to the jury which were not warranted by the record. But, when objections were made and a ruling requested, the

court promptly sustained the objections, and admonished counsel to keep within the record. In every instance where objections were made by appellant to the misstatements or misconduct, with a request for a ruling, such ruling was favorable to the appellant. The statements made and the misconduct complained of do not appear to have been of such a nature that any prejudice to the rights of appellant was not fully met and cured by the ruling and admonition of the court.

No prejudicial error appearing in the record, it is recommended that the judgment of the district court be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

J. A. BOGGS, APPELLEE, v. WILLIAM I. YOUNG ET AL., APPELLANTS.

FILED MAY 7, 1908. No. 15,191.

Sales: RESCISSION: ACTION FOR PRICE. Where, in a sale of personal property on time, the vendor within a few days after the sale, fearing that the contract of sale may be impeached for alleged mental incompetency of the vendee, retakes possession of the property sold and converts it to his own use, the vendee may waive his right to sue for conversion, and, by acquiescing therein, may treat the unauthorized act of the vendor as a rescission of the sale, and successfully urge such rescission as a defense in an action by the vendor to recover the purchase price.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed with directions.*

Hugh La Master, for appellants.

L. C. Chapman, contra.

GOOD, C.

On the 28th day of June, 1902, William I. Young purchased a threshing machine from J. A. Boggs for the agreed price of $650, and on the same day executed and delivered to Boggs a real estate mortgage for $855. Soon afterwards Young was placed under guardianship as a spendthrift. This action was brought by Boggs against Young and his guardian and others to foreclose the mortgage. Young and his guardian answered, averring that the mortgage had been given to secure payment for the threshing machine; that Young was mentally incompetent to contract at the time it was given; and alleged a rescission of the contract of sale and a failure of consideration. No appearance was made by the other defendants. The trial court found that Young was competent, but that there was a partial want of consideration, and allowed certain items of credit, and entered a decree of foreclosure in favor of the plaintiff for $557.56. Defendants Young and his guardian have appealed.

The evidence discloses that on the 28th of June, 1902, Young was indebted to Boggs in the sum of $116.84; that on that day he purchased a threshing machine from Boggs for the sum of $650, and that it was reasonably worth that amount. He executed three promissory notes for $285 each, and a real estate mortgage to secure them. The consideration for these notes and mortgage was the threshing machine and the $116.84. The difference between these two items and the amount of the mortgage Boggs agreed to advance to Young, but, in fact, he never did so. Four days after the purchase of the threshing machine proceedings were begun to place Young under guardianship. It was alleged that he was mentally incompetent and a spendthrift. After a contest the county court found that Young was a spendthrift and a fit subject for guardianship. An appeal was taken to the district court, with a like result. The decision was rendered in the county court on the 21st or 22d of July, 1902, but, owing to the delay

on account of the appeal, the guardian was not actually appointed and qualified until January, 1903. After the purchase of the threshing machine by Young he made two or three attempts to operate it, and then left it on the roadside and abandoned it. Shortly after the decision was rendered by the county court in July finding Young a fit subject for guardianship, Boggs took possession of the threshing machine, and caused it to be operated during the remainder of the threshing season of 1902, and also during the threshing season of 1903. Early in 1904 he sold the machine to a third party for $265. It appears that he received as a net income from the machine for the seasons of 1902 and 1903 the sum of $153. These several sums, together with the difference between the face of the mortgage and the amount that was due to Boggs on June 28, including the price of the threshing machine, were deducted by the trial court from the face of the notes and interest at the time of the trial, and a decree of foreclosure was rendered for the remainder.

Appellants contend that the trial court erred in finding Young competent at the time of the giving of the mortgage, and in its failure to find that the contract of sale had been rescinded, and in its failure to find that there was a total failure of consideration. On the question of Young's competency, the evidence is in conflict, but it clearly appears that Young possessed a very immature intellect. Young was a witness in behalf of the defendants, and if he had not been examined we would have been inclined to the view that the evidence would warrant a finding that he was incompetent; but his examination, together with all the other evidence, justifies the finding that he possessed sufficient mentality to enter into the contract, and the finding of the trial court in that respect is sustained by the record.

We are then confronted with this situation: Boggs sold and delivered a threshing machine to Young, who abandoned it, and within less than 30 days from the time of the sale Boggs retook possession of the machine and con-

verted it to his own use. Young and his guardian never objected or protested against the act of Boggs, but acquiesced therein. There is no pretense that Boggs had any legal right to take possession of the machine, and no denial that his act constituted a conversion. However, we think it is fairly inferable from the record that when Boggs found that Young was likely to be placed under guardianship, as incompetent, and that the sale of the threshing machine made to him a few days previously might be held invalid, he deemed it prudent and wise on his part to repossess himself of the machine, and that he did this for the purpose of protecting himself in the event that the sale and the mortgage should be questioned. Neither Young nor his guardian ever questioned Boggs' right to take possession of the machine or his title to the machine after he possessed himself of it. It is clear that the taking of the machine was a wrongful act, and that Boggs might have been sued by Young or his guardian for conversion. But, instead of doing that, Young's guardian acquiesced in Boggs' taking and exercising ownership over the machine, and now claims the right to treat Boggs' act as a rescission of the contract of sale. On the other hand, Boggs contends that he did not intend to rescind, that his act and conduct did not constitute a rescission of the sale, and that he is entitled to a foreclosure of his mortgage for the full amount. It is a familiar rule that, where one party to an executory contract renounces the contract and refuses to be bound thereby, the other party may accept his renunciation as a rescission of the contract, and the second party is not required to take any affirmative action to constitute an acquiescence in the rescission. A vendor who has a right to rescind the contract has a right of election between that remedy and an action for the contract price, but these remedies are not concurrent; and, by electing to pursue one with a knowledge of the facts, he waives the other. *First Nat. Bank v. McKinney*, 47 Neb. 149; *First Nat. Bank v. Tootle*, 59 Neb. 44; 24 Am. & Eng. Ency. Law (2d ed.), 1140. In

Story, Sales, sec. 419, it is said in substance that, if the vendor receives back the goods under protest, he does not thereby disclaim his right to insist upon performance by the vendee, but, if he undertakes to exercise acts of ownership over them, as by using or offering them for sale, the contract will be considered as rescinded. In 2 Parsons, Contracts (9th ed.), p. *678, it is said: "If either party, without right, claims to rescind the contract, the other party need not object, and, if he permits it to be rescinded, it will be done by mutual consent. Nor need this purpose of rescinding be expressly declared by the one party, in order to give to the other the right of consenting, and so rescinding. There may be many acts from which the opposite party has a right to infer that the party doing them would rescind." In *Redmond v. Smock,* 28 Ind. 365, it is held: "When, on a refusal by the buyer to complete a contract of sale and an abandonment by him of the property, the seller retakes possession of the property, treating it as his own, and sells the same, without notice to the buyer of an intention to sell for his account, it is a rescission of the contract." In *Grouse v. Wolfe,* 24 N. Y. Supp. 703, it is held: "After sale, delivery, and acceptance of an article, the purchaser offered to return it, and did take it to a place where the seller assumed possession, and thereafter sold it to another. *Held,* That there was a rescission of the first sale, and therefore an action would not lie against the purchaser at such sale for the purchase money." While none of these authorities go to the precise point, and the first authorities relate to executory contracts, we can see no reason why the principle laid down therein should not be applied to an executed contract such as the one at bar. Boggs, although without any right to rescind, did in fact undertake to rescind the contract of sale by retaking the subject of the sale and converting it to his own use. We think the proper rule to apply is that, under such circumstances, the vendee has the right either to sue for conversion or to accept and

treat the conduct of the vendor as a rescission of the contract. Certainly the vendor ought not to be permitted to complain that he did not have authority to rescind, when he had attempted the rescission. He ought not to be permitted to take advantage of his own wrong. He has taken it upon himself to say that he would repossess himself of the property sold, and, under such circumstances, he will not be permitted in a court of equity to exact a recovery of the purchase price. We therefore deduce the following rule as applicable to the case: Where, in a sale of personal property on time, the vendor within a few days after the sale, fearing that the contract of sale may be impeached for alleged mental incompetency of the vendee, retakes possession of the property sold and converts it to his own use, the vendee may waive his right to sue for conversion, and, by acquiescing therein, may treat the unauthorized act of the vendor as a rescission of the sale, and successfully urge such rescission as a defense in an equitable suit by the vendor to recover the purchase price.

There was but one item, therefore, included in the notes and mortgage in controversy upon which the appellee was entitled to a foreclosure, and that was for the debt of $116.84, due him at the time of the making of the mortgage. The judgment of the district court should be reversed, with directions to enter a decree of foreclosure for the sum of $116.84, with interest thereon at the stipulated rate.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to enter a decree of foreclosure for the sum of $116.84, with interest thereon from the date of the mortgage to the entry of the decree.

REVERSED.

ROBERT KIRKPATRICK, APPELLANT, V. ELLEN KIRKPATRICK, APPELLEE.

FILED MAY 7, 1908. No. 15,216.

1. **Divorce**: ABANDONMENT. The fourth subdivision of section 5328, Ann. St. 1907, construed, and *held* to mean that not only must the act of desertion or abandonment be wilful, but it must be wilfully continued for a period of two years.
2. ———: ———: INSANITY. Where the wife abandons the husband without just cause, and thereafter becomes insane, a cause of action for divorce does not accrue to the husband until the lapse of two years, exclusive of the time that she is insane.

APPEAL from the district court for Adams county: ED L. ADAMS, JUDGE. *Affirmed.*

R. A. Batty, for appellant.

F. P. Olmstead, contra.

GOOD, C.

The parties to this action were united in marriage in 1901, and lived together as husband and wife until December, 1903, when, so far as the record discloses, without any cause the wife took her clothing and left the home of her husband and went to the home of her sister. In less than a year she was adjudged insane and committed to the hospital for the insane at Lincoln, Nebraska, where she has since remained, except that she was released on parole for a period of two months in the summer of 1905. In September, 1906, Robert Kirkpatrick, the husband, brought this action for a divorce upon the ground of wilful abandonment for two years. A guardian *ad litem* was appointed, and answered for the defendant. The answer was a general denial, coupled with an averment of the facts as to her insanity and commitment to the asylum. Upon a trial of the issues thus joined, the district court found in favor of the defendant, and denied plaintiff a divorce,

upon the sole ground that the defendant had not been of sound mind for two years since she had abandoned the plaintiff, and held that the abandonment must be continued wilfully for two years. To review this judgment the plaintiff has appealed to this court.

The appeal presents but a single question for determination: Can abandonment be a ground for a divorce when the offending party has been sane for less than two years after the abandonment? The determination of this question rests upon the construction to be given to the fourth subdivision of section 5328, Ann. St. 1907. This section states the grounds for which a divorce from the bonds of matrimony may be granted. The ground stated in the fourth subdivision is: "When either party shall wilfully abandon the other without just cause for a period of two years." Appellant contends that the facts that while of sound mind the appellee abandoned her home and husband with the intention of not returning and that she had not returned to him for more than two years are sufficient to entitle him to a divorce, and that it is immaterial that she was of unsound mind during a portion of the two years. Upon the other hand, it is contended by the guardian *ad litem* of the appellee that not only must the act of abandonment be wilful, but the continuation of it for two years must be wilful; that appellee, having become insane within less than a year, was incapable of being wilfully absent or of wilfully continuing the abandonment of her husband; and that therefore no right of action for divorce accrued to the appellant. The precise question does not appear to have been frequently before the courts, and but few precedents can be found. The supreme court of Iowa, in *Douglass v. Douglass,* 31 Ia. 421, construed a statute somewhat similar to ours, and held that it was immaterial that the offending party became insane after the abandonment and before the expiration of the period requisite to constitute a ground for divorce. The Iowa statute reads as follows: "When he wilfully deserts his wife and absents himself without a reasonable cause for the space of

two years." The court in construing this statute held that the statute means that, if the husband wilfully deserts his wife when she by her conduct has not given him a reasonable cause, and if he afterwards remains away for the requisite period without her giving him any reasonable cause, she is entitled to a divorce. It was held that the reasonable cause which would justify the desertion or absence could only be established by proof of wrongful conduct on the part of the wife, and that no other cause for the absence than that arising from the misconduct of the wife could be shown to defeat her right of action, and that the absence of the husband could only be excused by the fault or misconduct of the wife, and could not be excused by the misfortune of the husband. In a more recent case the supreme court of New Hampshire held that, to entitle the husband to a divorce against his wife on the ground of abandonment while she was sane, such abandonment must be continued for the full statutory period prior to her insanity. *Storrs v. Storrs,* 68 N. H. 118. It was there held that the time during which the defendant was insane could not be included in computing the statutory period. It is a universal rule that, where one spouse abandons or deserts the other and returns to the unoffending party before the expiration of the statutory period, a ground of divorce does not arise or accrue. Our statute has fixed the period of two years, and the offending party could return at any time prior to the expiration of two years and thus prevent a cause of action accruing to the other party. Separation, no matter how long continued, unless there was an intent not to return, or, in other words, an intent to abandon, would not constitute a ground for divorce. On the other hand, no matter how wilful the desertion may be, nor how destitute of reasonable cause, there is no ground for divorce, unless it is continued for a period of two years. As is aptly stated in *Albee v. Albee,* 141 Ill. 550: "At any time during that period the offending party has an undoubted right to put an end to it, and if that is done no cause for divorce has

arisen. If at any time during the two years the party guilty of the desertion, in good faith and with an honest intention to resume the marital relations, returns or offers to return to the deserted husband or wife, the continuity of the desertion is broken. Nor can the deserted party prevent this by refusing to receive back and to resume marital relations with the one guilty of desertion. He or she cannot, because the other has taken a position, however wilful or causeless it may have been, hold him or her to it. For the two years the door of repentance and return must be kept open, and, if it is closed and barred when an offer to return is made in good faith, not only is the desertion terminated, but the circumstances may be such as to reverse the legal attitude of the parties, and constitute the party originally offended against, from that time forth, the offender."

We are of the opinion that the statute means and contemplates that the abandonment should be wilfully continued by the offending party for the full period of two years. If this were not true, we can see no reason why any definite time should be fixed in the statute for the abandonment to exist. The statute does not contemplate that the act of abandonment alone shall be sufficient ground for divorce. It must be continued for a period of two years. The cause of action does not accrue until that time. If the one of sound mind is entitled to have the door of repentance held open to him for two years, we think that the same opportunity should be afforded to one who is mentally incompetent; and it cannot be said that she is afforded such opportunity so long as her intellect is so clouded that she is incapable of forming the intent to return. A spouse who is insanse cannot, under our statute, be guilty of conduct that will constitute a cause for divorce in favor of the other, for the reason that she is incapable of intentionally doing or committing an act that will constitute a ground for divorce. The ground for divorce did not exist in favor of the appellant in this case at the time that appellee became insane. The cause of

action had not yet accrued to him. We are of the opinion that it could not accrue to him during her period of insanity. It follows that no part of the time during her insanity could be reckoned as a part of the two years' abandonment necessary to constitute a cause or ground for divorce.

The judgment of the district court is right, and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ERICK C. MUNK, APPELLANT, V. J. L. FRINK ET AL., APPELLEES.

FILED MAY 7, 1908. No. 15,029.

1. **Physicians:** REVOCATION OF LICENSE: COMPLAINT. "A complaint filed before the state board of health for the purpose of procuring an order revoking the license of a physician is sufficient if it informs the accused, not only of the nature of the wrong laid to his charge, but of the particular instance of its alleged perpetration." *Munk v. Frink*, 75 Neb. 172, reaffirmed and followed.

2. ———: ———: TRIAL. In a trial under such a complaint it is not necessary that the proceedings should be conducted with that degree of exactness which is required upon a trial for a criminal offense in an ordinary tribunal of justice.

3. ———: ———: ———. Proceedings by the state board of health to revoke a physician's license for cause are summary in their nature, and are triable before the board without the intervention of a jury.

4. ———: ———: CONDITIONS PRECEDENT. A trial and conviction in a court of competent jurisdiction is not a condition precedent to a proceeding by the state board of health against a physician to revoke his license for any of the causes provided by statute.

5. ———: ———: PLEADING. In a hearing by the state board of

health of charges against a physician for procuring or aiding or abetting in procuring a criminal abortion, it is not necessary to either allege or prove that the woman had become quick. It is not the murder of a living child which constitutes the offense, but the destruction of gestation where such destruction is not necessary in order to preserve the life of the woman. The moment the womb is instinct with embryo life and gestation has begun the crime may be perpetrated.

6. ———: ———: POWERS OF STATE BOARD OF HEALTH. The power conferred upon the state board of health to revoke a physician's license for cause is an administrative and not a judicial function, and the limit of judicial interference in such cases is to protect the accused in his right to a hearing upon specific charges after reasonable notice of the time and place of hearing has been given, and a full opportunity afforded him to present his defense to such charges and against a conviction, unless upon competent evidence.

7. ———: ———: FINDINGS: EVIDENCE. In such a case, when the state board of health has so proceeded and taken testimony, and given the respondent full opportunity to appear in person or by counsel to cross-examine the witnesses against him, and to introduce testimony in his own behalf, and has passed upon the sufficiency of the evidence so taken, the findings of the board as to the sufficiency of the evidence to sustain the charges will be upheld, unless it appears that there is no evidence to sustain such findings.

8. ———: ———: ———. Evidence examined, and *held* that the state board of health proceeded in the present case fairly and openly, and within the powers granted to it by the legislature; that appellant was given proper and sufficient notice of the hearing and full opportunity upon such hearing to vindicate himself from the charges preferred against him; and that the findings and judgment of the board are in all respects regular and in accordance with the statute under which it acted.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

J. J. Sullivan, A. M. Post and *H. Halderson,* for appellant.

W. T. Thompson, Attorney General, Halleck F. Rose and *H. C. Vail, contra.*

FAWCETT, C.

This case is before us for the second time. The opinion on the first hearing (75 Neb. 172) gives a full and accurate statement of the nature of the case. When the case was remanded to the district court, that court considered it upon its merits, and affirmed the findings of the state board of health revoking appellant's license to practice medicine, surgery, and obstetrics in this state; and to review such judgment this appeal is prosecuted.

The former opinion in this case and our opinion in *State v. Walker,* 75 Neb. 177, have settled adversely to appellant his contention that the complaint under which the state board of health proceeded is insufficient. It is argued that our holding on the former hearing that the complaint was sufficient is not the law of the case, for the reason that the reference to that question in the former opinion is mere dictum. In this contention we are unable to concur. Even if we were to hold that the discussion of the proposition by Commissioner AMES in that case is *dictum,* we would adopt his reasoning now in holding that the complaint is sufficient, and would support such holding by the authorities cited by Judge AMES. While it is true some courts have held that in a case of this kind the offense must be alleged with the same certainty and the evidence must be of the same degree as would be necessary in a criminal prosecution, the overwhelming weight of authority is against that idea. One of the strongest cases relied on by appellant in support of that contention is *Skeen v. Craig,* 31 Utah, 20, 86 Pac. 487; but an examination of that case will show that the only reason the court so held was because section 4575 of the act under which that case was being prosecuted provided that "the trial * * * shall be conducted * * * in the same manner as the trial of an indictment or information for a felony." It will be seen, therefore, that that case could not be considered as an authority in this. Our holding in the former opinion that "a com-

plaint filed before the state board of health for the purpose of procuring an order revoking the license of a physician is sufficient if it informs the accused, not only of the nature of the wrong laid to his charge, but of the particular instance of its alleged perpetration," is well sustained; and the contention of appellee that proceedings before the board for revocation of a physician's certificate are not to be conducted and carried on in conformity to the technical rules of procedure obtaining in courts of justice is fully supported by the following authorities: *Meffert v. State Board,* 66 Kan. 710; *State v. Common Council,* 53 Minn. 238; *Traer v. State Board of Medical Examiners,* 106 Ia. 559; *People v. Thompson,* 94 N. Y. 451; 1 Dillon, Municipal Corporations (4th ed.), sec. 255. In *Traer v. State Board of Medical Examiners, supra,* it is said: "The statute does not prescribe the practice to be followed in cases instituted for the revocation of certificates; and although it may, when practicable, follow somewhat the methods of the courts, yet, from the nature of the board and the character of the duties it is required to perform, a more flexible practice than that allowable in the courts must, of necessity, be followed in many cases." In *State v. Common Council, supra,* the court say: "We also recognize the fact that while in the exercise of this power their proceedings are *quasi* judicial, and hence reviewable by the courts, yet they are not courts, but essentially legislative and administrative bodies, and that their action should be considered in view of their nature and the purposes for which they were organized, and not tested by the strict legal rules which prevail in trials in courts of law. Hence, if such a body has kept within its jurisdiction, and the evidence furnished any legal and substantial basis for their action, it ought not to be disturbed for any mere informalities or irregularities which might have amounted to reversible error in the proceedings of a court. To apply any other rule to the proceedings of such bodies would be impracticable, and disastrous in the extreme to public interests." In

People v. Thompson, supra, it is said: "The charges as made were sufficient to answer the purpose intended, and were within the requirements of the statute under which the proceeding was had. It was not necessary that the proceedings should be conducted with that degree of exactness which is required upon a trial for a criminal offense in an ordinary tribunal of justice, and it cannot be said that the charges made were insufficient." In *Meffert v. State Board, supra,* it is said: "The provisions of the act creating the board plainly indicate that such investigation was not intended to be carried on in observance of the technical rules adopted by courts of law. The act provides that the board shall be composed of seven physicians. These men are not learned in the science of law, and to require of a board thus composed that its investigations be conducted in conformity to the technical rules of a common law court would at once disqualify it from making any investigation. It is subversive of the morals of the people and degrading to the medical profession for the state to clothe a grossly immoral man with authority to enter the homes of her citizens in the capacity of a physician. It was the intention of the legislature to adopt a summary proceeding by which the morals of the people and the dignity of the profession might be protected against such a possibility without being embarrassed by the technical rules of proceedings at law."

The contention of appellee that the act in question was a proper exercise by the legislature of its police powers is assailed by counsel for appellant as inapplicable and unsound, "because there is no necessity for the exercise of the power in that form"; but the contention of counsel for appellee is fully sustained in *Meffert v. State Board, supra.* The section of the statute under which these proceedings were had defines "unprofessional and dishonorable conduct," and includes "the procuring or aiding or abetting in procuring a criminal abortion" in that definition. Counsel for appellant assails his defini-

tion as "a profound legal bizarrerie," and says that the author of that definition "should be immortalized as an apostle of the incongruous." We are unable to concur in this severe criticism of the author of the section of the statute under consideration, or of the definition referred to. If "the procuring or aiding or abetting in procuring a criminal abortion" is not "unprofessional or dishonorable conduct" in one holding a certificate entitling him to practice medicine, then we are unable to conceive of any conduct of which such person might be guilty which could be called unprofessional or dishonorable. As stated by the supreme court of Pennsylvania in *Mills v. Commonwealth*, 13 Pa. St. 631: "It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman, because it interferes with and violates the mysteries of nature in that process by which the human race is propagated and continued. It is a crime against nature which obstructs the fountain of life, and therefore it is punished."

Counsel for appellant contends that "it follows that a sufficient complaint of unprofessional or dishonorable conduct within the meaning of section 14 must, in apt terms, charge the criminal destruction by the accused, either as principal or accessory, of a *vitalized human fœtus*"; that "there is here no charge, even by implication, of the destruction of a vitalized fœtus, which is the very essence of the crime of abortion." Authorities are not wanting to sustain this contention by counsel, but we fully concur in the following holding of the supreme court of Pennsylvania in *Mills v. Commonwealth, supra*: "The next error assigned is that it ought to have been charged in the count that the woman had become quick. But, although it has been so held in Massachusetts and some other states, it is not, I apprehend, the law in Pennsylvania, and never ought to have been the law anywhere. It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is

instinct with embryo life and gestation has begun the crime may be perpetrated." If the theory contended for by counsel for appellant should be sustained, it would be practically impossible to convict an abortionist for any abortion, or attempted abortion, during the first five months of pregnancy; for, if gestation had not proceeded to the period of quickening, there would be no way of disputing the testimony of the abortionist that what he removed from the woman was in fact a dead fœtus. Even the woman herself could not dispute this testimony prior to pulsation following the quickening period. It would be giving unlimited license to the abortionist to ply his nefarious calling, providing he confined his criminal operations to the early months of gestation. We prefer to be in line with the supreme court of Pennsylvania, and say, although it has been so held in Massachusetts and some other states, it is not the law in Nebraska, and never ought to have been the law anywhere.

It is also contended by counsel that by this proceeding they have been deprived of the right of a trial by jury. This contention was considered in *In re Smith,* 10 Wend. (N. Y.) 449, where it is said: "It is contended * * * that it conflicts with those provisions of the constitution of the United States and of this state which secure to the citizens the right of trial by jury, and prohibit the establishment of any new court, except such as shall proceed according to the course of the common law. * * * The power conferred by this statute is similar in its character and consequences to that which is possessed by the courts of record of this state over counselors, solicitors and attorneys. They may by statute (1 Rev. St. 108, secs. 23, 24) be removed or suspended by the several courts to which they belong. The twenty-fourth section prescribes the mode of proceeding in such cases. They are strictly summary. A copy of the charges is to be delivered to the party, and he is to have an opportunity of being heard. But there is no grand jury to indict, or petit jury to

try, nor any of the usual concomitants of a trial by jury; and yet I believe no constitutional objections were ever raised to this jurisdiction." Continuing, the court say: "The practice of physic and surgery in this state was regulated by law as early as 1760 (2 Rev. Law, 219, note), and such regulations have been altered and extended from time to time down to the passing of the act in question. Under the law as it previously existed the county medical society were authorized to make such by-laws and regulations relative to the admission and expulsion of members as they thought fit and proper, not inconsistent with the constitution and laws of the state." So, also, section 5 of the act in question provides that our state board of health "may make and adopt all necessary rules, regulations and by-laws not inconsistent with the constitution and laws of this state or of the United States to enable it to perform its duties and transact its business under the provisions of this act." Comp St. 1903, ch. 55.

The further contention is made by counsel that proceedings against appellant should have been preceded by a conviction in a court of competent jurisdiction. This contention is decided adversely to them in *In re Smith, supra*. The court say: "The trial and acquittal of the defendant upon the indictment for producing the abortion was no bar to this proceeding. They are entirely distinct and independent proceedings, having different objects and results in view; the one having regard to the general welfare and criminal justice of the state, the other simply and exclusively to the respectability and character of the medical profession, and the consequences connected with or necessarily flowing from it. It is immaterial, therefore, in my judgment, whether the offense mentioned in the charge was indictable or not, and whether the indictment was disposed of upon its merits, or upon some matter of form." If, as stated by the New York court, a trial and acquittal of the defendant upon his indictment for producing an abortion would not be a bar to the proceeding, it follows, as a matter of course, that a trial and

conviction for producing an abortion is not a condition precedent to proceedings to revoke a license.

It is contended that no right of review of the evidence exists. A careful consideration of the question satisfies us that where the officer can only be removed, or the licensee have his license revoked, for cause first found and ascertained by the board or tribunal provided for that purpose, the right of review should be preserved. This was so held in the former opinion in this case. 75 Neb. 172. In such a case the findings of the board should be upheld, unless it clearly appears that there is no evidence to uphold them. We have carefully read the entire record, and if it were now before us as a bill of exceptions in an ordinary court trial, with a verdict of the jury against appellant, we would be compelled to hold that the evidence sustains the verdict.

A consideration of the whole case has convinced us that the state board of health proceeded in the present case fairly and openly and within the powers granted to it by the legislature; that appellant was given proper and sufficient notice of the hearing, and every opportunity upon the hearing to vindicate himself from the charges preferred against him; that the findings and judgment of the board were in accord with the law and fully sustained by the evidence; and that the district court did not err in affirming its proceedings.

We therefore recommend that the judgment of the district court be affirmed.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

REESE, J., not sitting.

DANIEL G. WALKER, APPELLANT, V. D. B. MCMAHN ET AL., APPELLEES.

FILED MAY 7, 1908. No. 15,015.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

J. J. Sullivan and *A. M. Post,* for appellant.

W. T. Thompson, Attorney General, Halleck F. Rose and *H. C. Vail, contra.*

FAWCETT, C.

This case was tried before the board and in the district court, and argued and submitted in this court, at the same time and upon the same record as *Munk v. Frink, ante,* p. 631, and is controlled by the law and evidence in that case; and, for the reasons there stated, we recommend that the judgment of the district court be affirmed.

It is true appellant acted as assistant only to Dr. Munk in performing the operations complained of, but the evidence shows such a concert of action between these two doctors in these and other cases of a similar nature, and such a ready and unquestioning participation by appellant herein with Dr. Munk in the performance of the two operations involved, that there is no escape from the conclusion that if one were guilty both were.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion and in the opinion in *Munk v. Frink,* therein referred to, the judgment of the district court is

AFFIRMED.

REESE, J., not sitting.

FARMERS & MERCHANTS IRRIGATION COMPANY, APPELLANT, v. JOHN H. BRUMBAUGH, APPELLEE.

FILED MAY 7, 1908. No. 15,165.

1. **Payment Under Mistake:** ACTION: PLEADING. "Money paid by mistake may, in some cases, be recovered back in an action at law, but in such cases the mistake must be pleaded and proved." *Renfrew v. Willis*, 33 Neb. 98.
2. **Trial:** WATERS: WITHDRAWING QUESTION FROM JURY. Where the evidence shows that a party who has purchased a water right from an irrigation ditch company has voluntarily paid one year's maintenance charges, and there is other evidence tending to show that such purchaser at the time of said purchase agreed to pay an annual maintenance fee of a like amount as that voluntarily paid, and the company brings suit for subsequent maintenance fees claimed to be due and unpaid, it is error for the trial court to withdraw the question from the jury.
3. **Evidence** examined, and *held* insufficient to sustain the verdict returned by the jury.

APPEAL from the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

E. A. Cook, for appellant.

H. M. Sinclair and *Warrington & Stewart, contra.*

FAWCETT, C.

The petition sets out three causes of action. The first and second are upon promissory notes given as a part of the purchase price of a perpetual water right for 80 acres of land in Dawson county. The third is for moneys claimed by plaintiff to be due, at the rate of 50 cents an acre per annum, for maintenance fees. The defense to the first and second causes of action is that plaintiff has wholly failed, neglected and refused to furnish defendant any water, although often requested so to do; that plaintiff has sold water rights above the land of defendant far

in excess of the capacity of its ditch; that, by reason of the smallness of its dimensions and capacity, the ditch as constructed does not, and cannot at any time, carry water sufficient to irrigate more than 1,000 acres of land, whereas there are 8,000 acres of land above defendant's land for which plaintiff has sold water rights; that, by reason thereof, plaintiff is wholly unable to supply water for defendant's lands when needed for irrigation purposes, and has been so unable at all times since the making of the agreement between plaintiff and defendant therefor, and that defendant's crops have been left wholly dependent upon the natural rainfall. The answer further alleges that defendant has been compelled to pay one note of the series given for the purchase of the water right, and a claim of $40 for maintenance; alleges that another of the notes has been merged into a judgment which was rendered in defendant's absence, in which judgment there was included items of interest and claims for maintenance, so that said judgment was for the amount of $160. It further alleges that defendant has received no benefit of any kind, in any manner, at any time, from said ditch, and that the consideration of the notes in suit has wholly failed; and asks judgment for the amounts paid as above set out. For reply plaintiff denies that its ditch was of insufficient capacity; alleges that it never contracted and agreed to furnish water to defendant, except when there was sufficient water in the Platte river for that purpose; that it was the duty of defendant to construct and maintain laterals from the ditch of plaintiff to defendant's land, but defendant has failed to construct the same; that plaintiff did everything necessary under its contract to enable defendant to take water from the ditch, and that if defendant did not get water, when water was to be had in the Platte river, it was on account of his own neglect and carelessness, and not by reason of any fault of the plaintiff; admits defendant has paid one note and one year's maintenance fee, and alleges that the same were voluntarily paid by defendant; admits that it has recov-

ered a judgment against defendant on two of his notes, and alleges that such judgment remains wholly unpaid, and that the same was regularly obtained. There was a trial to the court and a jury, and a verdict in favor of the defendant for $107.05, being the amount of the note, with interest, which defendant alleges he had been forced to pay, but which plaintiff alleges he paid voluntarily. A motion for new trial was overruled, and judgment entered upon the verdict, from which judgment this appeal is prosecuted.

1. The evidence in the case is not of a very satisfactory character from whatever point it is viewed. It is admitted by the parties that defendant purchased from plaintiff a perpetual water right for 80 acres of land, and gave plaintiff five notes for $80 each in payment therefor, and that the two notes set out in plaintiff's first and second causes of action are two of that series of notes. The ditch was constructed. Defendant introduced a number of witnesses who testified that during the summers of 1901, 1902, 1903, and 1904 there was very little and sometimes no water in the ditch at the point where it would have to be taken out to irrigate defendant's land. Plaintiff introduced one or two witnesses who testified that there was plenty of water in the ditch. Plaintiff also contends that the evidence shows that, if there was not sufficient water in the ditch at all times, it was because there was not sufficient water in the Platte river, which was its source of supply, and that plaintiff never agreed to furnish water to any of its customers, except when there was a sufficient supply of water in the river. There is some evidence to sustain plaintiff's contention that the insufficiency of the water was the result of the scarcity of that article in the river. Defendant's witnesses testify that they went to the head of the ditch at one time to ascertain why they were not getting sufficient water, and they found that plaintiff had a number of men and teams there extending the head of the ditch across the Platte river for the purpose of throwing into the ditch

such straggling small streams of water as were still flowing in the river. On all of these points the evidence is very meager and quite unsatisfactory. It is contended by defendant that plaintiff agreed to furnish an abundant supply of water at all times, and that the notes were given in consideration of that promise; while plaintiff contends that it only agreed to furnish water when it was to be had from the river, and that the river dried up at certain seasons of the year, so that water could not be obtained from that source. In the light of our former holdings, the contract which plaintiff claims it made is the only one which it could lawfully make. In *Farmers Canal Co. v. Frank,* 72 Neb. 136, 156, we held that a ditch company is not the owner of the water which it conveys to persons for whose lands it is appropriated; that "it is only the servant of the public to carry it to the land for which it has been appropriated, and this service it is bound to perform." We did not overlook the duty resting upon the company, for we further said: "Nor do we mean to say that an irrigation company may refuse or neglect, with impunity, to supply water to persons for whose lands it has been allowed to appropriate the same. The law grants to corporations of this character valuable rights, but with these rights are accompanying duties to the landholders for the irrigation of whose land the rights are granted, and, if these obligations are not fulfilled, the law will interfere at the request of the party injured." It was beyond the power of plaintiff to agree to furnish an abundant supply of water at all times. The only agreement it could make under the statute and our former decisions would be to maintain a ditch of sufficient capacity, and in good condition, so as to be able to supply the owner of a water right with the amount of water to which he was entitled. This amount, of course, would vary if sufficient water was not to be obtained from the river at all times to supply all the owners of water rights served by the ditch. Moreover, it would seem that the company could not contract to give persons owning lands near the

head of the ditch a certain and definite amount of water at all times, in disregard of the rights of the persons owning property lower down, and that no owner of land under this ditch could ever be entitled to more than his *pro rata* share of the available water. The defendant bought the water right subject to the laws of the state of Nebraska governing irrigation, and must be held to have contracted with reference thereto. The testimony of defendant himself clearly indicates a familiarity with the laws and customs governing the purchase of water rights and the payment of maintenance charges, and with this knowledge, and under this state of the law, he gave his notes. This being true, then the fact, if it be a fact, that, by reason of the drying up of the river at certain seasons of the year, plaintiff was unable to furnish him with an amount of water sufficient to properly irrigate his lands, would not constitute a failure of consideration of the notes given by the defendant for the purchase of his water right. The evidence upon all of these points is so unsatisfactory that, had the judgment of the court been for the defendant simply, we would not feel like disturbing it, but there is no theory upon which the verdict which was returned by the jury and the judgment entered thereon can be sustained. If the evidence were perfectly clear and convincing that plaintiff is not entitled to recover upon his several causes of action, we would feel disposed to order a remittitur of the amount returned by the jury and affirm a judgment against the plaintiff for costs, but the evidence is not clear enough to warrant us in taking that course. We therefore leave the entire matter open for another trial, when the facts may be made to more clearly appear.

2. A careful examination of the record discloses without controversy that the note which defendant paid, and upon which the verdict was based, was paid voluntarily by defendant some time after its maturity, and that the $40 which he paid for maintenance fee was also paid voluntarily by him. The latter part of the fifth instruction,

given by the court on its own motion, tells the jury that defendant cannot "recover from plaintiff the $40 maintenance charges paid by him for the year 1901, because such payment was voluntary and made after the expiration of the season for furnishing water for 1901." That part of the instruction quoted was clearly right, but we are at a loss to understand why the court did not instruct the jury in the same manner as to the note which defendant had paid. The evidence is just as clear and uncontradicted that the note was paid voluntarily as that the $40 maintenance charge was so paid. The evidence does not disclose that plaintiff ever made any demand upon defendant for the payment of the note. In fact, there is absolutely no evidence in the record even tending to negative plaintiff's contention that defendant paid the note voluntarily, without any claim that the consideration for it had failed, or that there was any reason why he should not pay it. It stands, therefore, undisputed in this record that the payment of the note, which formed the basis of the verdict of the jury, was a voluntary payment on the part of defendant, and, such being the fact, he was not entitled to recover back from plaintiff the amount of such payment. *Renfrew v. Willis,* 33 Neb. 98; *Lathrope v. McBride,* 31 Neb. 289; *Boyer v. Richardson,* 52 Neb. 156; *Smith v. Kennard,* 54 Neb. 523. Why did defendant pay the note? If the ditch was insufficient in size to carry water to his land, he knew that fact when he paid it. If the consideration had failed, he knew it. He has failed to either plead or prove that he paid the note under duress or mistake of fact, both of which were necessary to enable him to recover back the money he had paid for a surrender of his note. In *Renfrew v. Willis, supra,* we held: "Money paid by mistake may, in some cases, be recovered back in an action at law, but in such cases the mistake must be pleaded and proved."

3. The first sentence in instruction No. 5 reads: "You are instructed that there is no evidence in this case tending to show that defendant agreed to pay plaintiff for

maintenance as set forth in the third cause of action of plaintiff's petition, and, as to such cause of action, your verdict will be for the defendant." This was error. While it is true that the evidence was not as clear and satisfactory as we would like, yet it cannot be said that there was no evidence tending to show that fact. The evidence shows that defendant paid one year's maintenance charges, and in his own testimony, as a witness, we have the following: "Q. You bought water right for 80 acres of land? A. Yes; I suppose I did. Q. When you bought that water right, was there anything said to you by any of the officers of the company in reference to your paying 50 cents an acre for an annual maintenance fee? A. I don't remember of any understanding that we had, any more than what the notes show. Q. Were you asked to pay an annual maintenance fee of $40 a year? A. I paid one. Q. How did you come to pay that? A. I suppose I was notified that there was a maintenance fee due. Q. Do you remember what year that was for? A. I would judge it was for 1901. It was the first note for maintenance that became due. Q. Had you given a note for the maintenance of that year? A. No, sir; there were no notes given for the maintenance. Q. But what you paid was for the year 1901? A. Well, it was the first note due, I think it was '01. Q. Do you mean the first annual maintenance due? A. Well, the first note due. There was a maintenance due at the same time, along with the note. I don't know what year it was for." There was some other testimony of similar character to the above, but what we have set out was sufficient to demand that the question as to whether or not defendant was liable for a maintenance fee be submitted to the jury, and it was error on the part of the court to withdraw it.

4. Plaintiff urges that the court erred in stating the issues to the jury by practically setting out in full all of the allegations of the petition, answer and reply, and insists that we should make our former criticisms of such practice binding upon the trial courts by now holding

that it is error so to do. Our holding as to instruction No. 5 renders it unnecessary to discuss this assignment; and we pass it without consideration.

For the errors above indicated, we recommend that the judgment of the district court be reversed and the cause remanded.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

ALFRED W. DOWNEY, APPELLEE, V. FRANK COYKENDALL, APPELLANT.

FILED MAY 7, 1908. No. 15,176.

1. **Police Judges: FEES: STATUTES: CONSTRUCTION.** Consistent statutes relating to the same subject, though enacted at different times, are to be construed as if enacted together and on the same date. So construed, section 34, ch. 28, Comp. St. 1907, imposing a penalty for the collection of excessive fees, applies to police judges.

2. **Consolidation of Actions.** Where persons who should have joined as plaintiffs in an action split their joint demand and bring separate suits, a motion to consolidate such suits under the provisions of section 150 of the code should be sustained.

3. **Fees: COMPLAINT: SEVERAL DEFENDANTS.** Statutes giving fees are to be construed strictly, and are not to be extended by implication. Where a complaint is filed against several persons, the same fees should be charged as if there were but a single defendant, until demand is made for separate trials; and then fees should only be charged for such extra duties as are necessarily caused by such separation.

4. **Police Judges: FEES: ACTION: DEFENSES.** A police judge sued under the provisions of section 34, ch. 28, Comp. St. 1907, for taking excessive fees may not justify the taking of such fees by showing that he acted under the direction of the prosecuting attorney.

APPEAL from the district court for Hamilton county: ARTHUR J. EVANS, JUDGE. *Reversed.*

Hainer & Smith and *Charles P. Craft,* for appellant.

O. A. Abbott and *J. H. Edmondson, contra.*

CALKINS, C.

The defendant was police judge of the city of Aurora on the 8th day of January, 1906, at which time a complaint was filed with him charging the plaintiff and seven other persons named with "maintaining a building wherein persons were unlawfully permitted to assemble for the purpose of drinking intoxicating liquors." The defendant thereupon issued a warrant for the plaintiff and the seven others charged with him, who were thereafter brought before the defendant as such police judge. One of the persons thus arrested demanded a separate trial, which was had, and which resulted in a conviction and the imposition of a fine of $50 and costs. Negotiations were then had for a settlement of the case, and it was finally agreed that four of the said eight persons should each plead guilty of disturbance of the peace, and should each be fined in the sum of $10, and that upon the payment of such fine and costs of proceedings such complaint should be dismissed. Pending the negotiations for this settlement the city attorney filed another complaint against 24 persons, including the plaintiff and the Aurora Commercial Club, charging them with a like offense; and still another complaint against the eight first complained of for disorderly conduct. When the settlement was effected, the defendant estimated the costs in all these cases at $175. He arrived at this estimate by treating the case of each individual defendant in each of said complaints as a separate and independent cause, and taxed costs as if there had been 40 separate cases. This amount of $175 was paid to defendant; but there is a dispute as to the manner of its payment, the defendant contending that he

received this amount in gross from the attorney for all the persons charged, without ascertaining the amount chargeable to any one individual, and, in fact, only estimating the total, with the understanding that, if when the costs were accurately ascertained such sum should be insufficient to liquidate the same, the parties making such payment should make good the deficiency, and if such sum should prove more than sufficient, the excess should be returned to him. On the other hand, the plaintiff contends that he paid to the defendant $20.75, being $10 fine and $10.75 costs, which he alleges was $5.78 in excess of the legal fees chargeable against him. This action was brought to recover such excess fees, and $50 penalty under section 34, ch. 28, Comp. St. 1907. The trial judge directed a verdict for the plaintiff in the sum of $53.50; and, from a judgment rendered upon this verdict, the defendant appeals.

1. The defendant contends that because the office of police judge did not exist at the time of the enactment of section 34, ch. 28, Comp. St. 1907, imposing a penalty for the collection of excessive fees, this section cannot be held to apply to such officers. This section, which was part of the Revised Statutes of 1866, provides: "If any officer whatever, whose fees are hereinbefore expressed and limited, shall take greater fees than are so hereinbefore limited and expressed, for any service to be done by him in his office, or if any such officer shall charge or demand and take any of the fees hereinbefore ascertained and limited, where the business for which such fees are chargeable shall not be actually done and performed, such officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recoverable by law." The fees of justices of the peace were fixed by section 11 of the same chapter; and, when the law creating the office of police judge was enacted, it was provided that such officers should receive the same fees as a justice of the peace for similar services. Section 8 of the act relating to cities of the second class, laws 1879, p. 195. From

this time police judges were among the officers whose fees were, in the language of section 34, *supra*, "hereinbefore expressed and limited"; and, if this section had been thereafter enacted, there could be no doubt, not only that the spirit of its provisions applied to police judges, but such officers would have been in such case included in the literal terms of the language used. It is justly said that this statute is a penal one and must be strictly construed, and that it governs only those transactions which are both within its letter and spirit. In strict interpretation as in liberal the object is to ascertain the true legislative intent; and, where this is clear without interpretation, there is no room for the application of the rule that penal statutes are to be strictly construed. The question here presented is whether the law is to be understood as speaking at the present time and in reference to statutes now existing, or whether we must construe it as speaking in reference only to those matters included in contemporary statutes at the time of its enactment. We understand the doctrine to be that all laws of whatever different sorts and at whatever different dates established are to be construed together. Bishop, Statutory Crimes (3d ed.), sec. 86. Consistent statutes relating to the same subject, though enacted at different dates, are to be construed as if enacted together and on the same date. 1 Sutherland, Statutory Construction (Lewis, 2d ed.), sec. 283 *et seq.; Sales v. Barber Asphalt Paving Co.*, 166 Mo. 671, 66 S. W. 979; *Hendrix v. Rieman*, 6 Neb. 516; *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 698; *United States v. Nichols*, 4 McLean (U. S.), 23. Applying these principles to the statute under consideration, it follows that the same must be read with other statutes *in pari materia* as expressing the present legislative will. So interpreted there is no doubt about its meaning nor room for construction. A police judge is one of the officers whose fees are therein-before limited and expressed, and who is therefore within the literal terms as well as the spirit of the law imposing a penalty for the taking of excessive fees.

2. In the first cause of action stated in the plaintiff's petition, after alleging the official character of the defendant, the making of the complaint, the arrest of the plaintiff and the seven others included therein, and the separate trial of one, the allegations of the plaintiff were as follows: "And it was finally agreed that four of said eight persons named in said warrant and complaint should each plead guilty of disturbing the peace and should each be fined in the sum of ten dollars, and that upon payment of such fines and the costs against all of said eight persons all proceedings under said complaint and warrant should be dismissed; that in pursuance thereof said fine and costs were paid. Plaintiff further alleges that upon the return of the warrant the said Frank Coykendall, the defendant herein, as such police judge, without any warrant or authority of law therefor, docketed eight separate cases; that is to say, docketed one case against each of the eight persons named in said complaint and warrant, but did not docket any case against the said eight persons jointly. Plaintiff further alleges that said defendant as such police judge unlawfully charged and taxed against each of said eight persons a fee of 25 cents for docketing each case, making $2 in all for docketing one case, and unlawfully charged and taxed against each of said eight persons a fee of 50 cents for taking complaint, making $4 in all for taking one complaint, and unlawfully charged and taxed against each of said eight persons a fee of $1 for issuing said warrant, making $8 in all for issuing one warrant. Plaintiff further alleges that during the separate trial of said A. T. Parris, and before the case as against the other seven persons had been set for trial, the said Frank Coykendall, defendant, as such police judge pretended to make eight separate continuances in each of said cases not upon trial, and charged each of said seven other persons a fee of 50 cents for each continuance, making a charge of $3.50 against each of said seven persons for one continuance, and making $24.50 for said alleged continu-

ances. A transcript of said cause as docketed against this plaintiff is hereto attached, marked 'Exhibit C'; that is to say, the defendant was entitled to charge and tax against the said eight persons the following fees and no more, to wit:

Taking complaint	$0.50
Issuing warrant	1.00
Docketing cause	.25
Total	$1.75

"And that he did actually charge, tax, demand and receive the following sums for such services, to wit:

Taking complaint	$4.00
Issuing warrant	8.00
Docketing cause	2.00
Eight continuances ($4)	$32.00
Total	$48.00

"Plaintiff further alleges that his part and portion of the legal costs as above set out amounted to the sum of 22 cents, and that the defendant unlawfully demanded and received from this plaintiff as his share of said costs the full sum of $6; that is to say, the defendant unlawfully charged and taxed against this defendant the sum of $5.78 in excess of the fees lawfully taxable, and this plaintiff paid the same on the 16th day of January, A. D. 1906, and plaintiff alleges that at the time the agreement was made in regard to paying fines and costs as above set out he had no knowledge of the charges so made, whereby and by reason of the premises an action has accrued to this plaintiff to have and recover of and from the said Frank Coykendall the full sum of $5.78 so unlawfully charged and received, with interest thereon from January 16, 1906, at the rate of 7 per centum per annum." The second cause of action contained the same allegations, but demanded judgment for the penalty of $50.

The answer of the defendant, which is very voluminous, purports to set forth the services performed by the justice for each of the eight persons complained against in the

first case, and against the same persons in the case for disorderly conduct, and in the second complaint against the 24. It alleges a settlement by which the plaintiff in this action and three others were to plead guilty to a charge of disorderly conduct; that thereupon all other complaints should be dismissed at the cost of the defendants; and that the defendants' attorney pay $175, which was the estimated amount of all the costs, but which amount was subject to correction when the costs should be actually taxed.

It appears that the seven other persons complained of with the plaintiff had brought actions similar to this, which were pending in the same court, and a motion was made to consolidate this case with the other actions so brought. This motion was denied, and the refusal of the court to order such consolidation is one of the errors assigned. Whether this motion should have been sustained depends upon whether the costs paid were paid jointly or separately by each individual. Upon this question neither party seems to us to be entirely consistent in the respective arguments. The plaintiff contends that for the purpose of taxing costs a complaint against the eight should be treated as one case; but, when he brings his action for the penalty, he claims that each is a separate transaction. On the other hand, the defendant claimed the right while taxing costs to separate the complaints into as many actions as there were individuals complained of; but, when he is called to account for demanding excessive fees, he insists that the whole constitutes but one transaction. The right to consolidate must be determined by the allegations of the petition. The agreement therein set forth is that four of the eight persons charged should plead guilty to disturbing the peace, and each be fined the sum of $10, and "that, upon payment of such fines and the costs against all of said eight persons," proceedings under the complaint should be dismissed. This allegation treated the liability for costs as a joint one, which we think it was in fact and in law. Saving the one case

where a separate trial was had, each defendant was liable for all the costs. While one payment would satisfy the costs against all, no one of the defendants was entitled to have the same apportioned and pay his *pro rata* share. Had one defendant paid the entire costs, he might have maintained an action to recover any excess charged, and the penalty; but, since the respective shares of the defendant parties cannot be apportioned, it is necessary for all the parties participating in the payment to join in any such action. We think that the statute (code, sec. 150) is broad enough to cover a case where the persons who should have joined as plaintiffs in an action split their joint demand and bring separate suits, and that the motion should have been granted. We do not lose sight of the fact that according to the plaintiff's testimony his share of the costs was apportioned and that he paid the specific amount demanded of him by the defendant. In this, however, he was contradicted; and, if it were not reversed for the error in refusing to consolidate, the judgment of the district court would have to be set aside for its refusal to submit this question to the jury.

3. In a civil action against joint wrongdoers the judgment for both damages and costs is joint, and the whole may be collected from any one defendant. In criminal proceedings where the trial and conviction are joint, the better rule would seem to be that the judgment should be separate for the fines, but joint for the costs. The enforcement of this rule does not seem to us to involve any real difficulty in practice, and certainly none that calls for multiplying the fees by the number of the defendants jointly charged. Statutes giving fees are strictly construed, and are not to be extended by implication. It is against public policy to unnecessarily increase the costs of a prosecution, and it is well settled that, where a party makes unnecessary costs, they will be taxed against him. *State v. Saline County*, 18 Neb. 422. Where an officer himself performs his duty in such a way as to make unnecessary fees, they cannot, for the same reason, be taxed

as costs. Where a complaint is filed against several persons, only one warrant should ordinarily be issued; and, until a demand for a separate trial is made, only one case should be docketed. For the various steps taken in such a case the same fees should be charged as if there were but a single defendant, until demand is regularly made for separate trials, and then fees should only be charged for such extra duties as are necessarily caused by such separation. The fee allowed for a continuance should only be charged for actual and substantial postponement, and not for mere recess; nor for postponements because the justice is engaged in other business. A magistrate should exercise scrupulous care not to make unnecessary costs and expenses; and, whenever his right to charge a fee is doubtful, he should resolve that doubt against himself.

4. The defendant offered to prove that, when the city attorney filed the complaint in question, he requested the defendant to docket the case against each of the parties complained of and issue separate warrants for each. There was no error in excluding this evidence. The prosecutor had the power to decide whether he would file separate or joint complaints; but, when he has made his election, his discretion ends, and he had neither power nor authority to authorize the defendant to split one case into eight. No such direction, if made by him, would excuse the defendant. The prosecutor himself owes a duty not to make unnecessary costs. To do so intentionally is to be guilty of oppression, which was a crime at common law. Stephens, Digest of Criminal Law, art. 119. And it is not the less reprehensible because it is not penalized by statute.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing

opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance therewith.

REVERSED.

CHARLES F. PRIBBENO, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY ET AL., APPELLANTS.

FILED MAY 7, 1908. No. 15,105.

1. **Negligence:** EVIDENCE. Evidence of subsequent repairs made or precautions taken after an accident or the infliction of an injury is not admissible to prove antecedent negligence.
2. **Damages:** EVIDENCE. Where growing crops are totally destroyed as a result of defendant's negligence, plaintiff can recover their fair market value at the time of their destruction, and testimony tending to show their value at that time is competent, even though on cross-examination it appears that the witness did not include in his mental estimate every factor of uncertainty that might enter into the value of the said crops at the time of their annihilation.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Reversed.*

F. Martin, F. E. Bishop and *F. M. Dewcese,* for appellants.

E. Falloon and *J. E. Leyda, contra.*

ROOT, C.

The Nemaha river flows in a general southeasterly direction through Richardson county. The railroad company's railway is constructed across the valley of said river in an east and west course, crossing the river about a mile and a half east of the village of Preston. Above this crossing the river describes an irregular open loop, its path up-stream from that point being nearly north by west, thence west, and thence southwest. Just at the

crossing of the railway the river approaches the foothills on the north side of the valley. The railway is constructed on a grade some eight to fourteen feet above the surface of the ground, and the only opening for the escape of the flood waters in 1900 was underneath the railway bridge which spanned the channel of the stream. In 1900 plaintiff owned a small tract of land and leased a much larger parcel, all situated north of the railway grade west of the bridge, and within the loop of the river hereinbefore described. Plaintiff alleged that the embankment of said railway was negligently constructed, in that provision was not made by way of sufficient openings therein for the escape of the flood waters, and, by reason thereof, said waters were arrested and held back by said embankment, so that at times the water on the north side of the embankment was from four to five feet higher than on the south side, and was held in that condition for days; that in July, 1900, by reason of the premises, the flood waters of said river were checked and thrown back upon the lands owned and leased by plaintiff, and the crops thereon destroyed. Defendants answered by way of general denial, and pleaded the four-year statute of limitations.

1. Over defendant's objection, plaintiff was permitted to prove that subsequent to the flood defendants "lengthened the bridge and took out the ground so the water could go through." Defendants not only objected to the testimony, but moved to strike it out of the record, so the court was well advised that defendants insisted the evidence was incompetent. So far as our brief research has been rewarded, we find that only three courts in the United States permit the introduction of that class of evidence where the issue is the alleged negligence of the defendant, and they are Utah, Kansas and Pennsylvania. In the earlier history of the states a contrary rule was adopted in Minnesota, Georgia and New York. As Judge Elliott demonstrates, the overwhelming weight of authority is against permitting proof that subsequent to the injury defendant made repairs or changed the condition

of the machinery or immovables responsible for the injuries the subject of the suit. 1 Elliott, Evidence, sec. 228; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524; *Sappenfield v. Main Street & A. P. Co.*, 91 Cal. 48; *Corcoran v. Village of Peekskill*, 108 N. Y. 151; *Hodges v. Percival*, 132 Ill. 53; *Shinners v. Proprietors of Locks & Canals*, 154 Mass. 168, 26 Am. St. Rep. 226; *Anson v. Evans*, 19 Col. 274; *Sievers v. Peters Box & Lumber Co.*, 151 Ind. 642; *Dillon v. City of Raleigh*, 124 N. Car. 184; *Cramer v. City of Burlington*, 45 Ia. 627; *Sylvester v. Town of Casey*, 110 Ia. 256; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. , *Getty v. Town of Hamlin*, 127 N. Y. 636; *Morse v. Minneapolis & S. L. R. Co.*, 30 Minn. 465, wherein the court overruled its former decisions to the contrary; *Missouri P. R. Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *Georgia S. & F. R. Co. v. Cartledge*, 116 Ga. 164, 42 S. E. 405. This is a leading case wherein Mr. Justice Lumpkin reviews the authorities and overrules the Georgia cases theretofore holding such evidence admissible. *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202; 6 Thompson, Commentaries on Law of Negligence, sec. 7871; *Standard Oil Co. v. Tierney*, 92 Ky. 367, 36 Am. St. Rep. 595. Kansas has held to the contrary in *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176; Pennsylvania, in *Lederman v. Pennsylvania R. Co.*, 165 Pa. St. 118; Utah, in *Jenkins v. Hooper Irrigation Co.*, 13 Utah, 100. Pennsylvania and Kansas adhere to their former decisions, and the law in those states may be said to be well settled. We believe logic, reason and sound public policy direct that we follow the rule adopted by the majority of the state courts. The testimony would naturally impel the jurors to believe the railway company had ascertained its fault and was endeavoring to repair its dereliction, hence without question it had admitted its negligence.

2. It is insisted the court permitted witnesses to invade the province of the jury in fixing plaintiff's damage. Plaintiff and his witnesses testified to the value of the crops destroyed, and that was the only proper measure of

damages; the crops having been totally demolished. *Chicago, B. & Q. R. Co. v. Emmert,* 53 Neb. 237; *Berard v. Atchison & N. R. Co.,* 79 Neb. 830. The cases cited by defendants where chattels were injured, but not destroyed, and others wherein witnesses testified directly to the conclusion of the amount of damages, not the value of the property, are useless in the instant case. It cropped out in the cross-examination that some of the witnesses in making an estimate of the value of the crop in July assumed as a basis for computation the value of a crop at maturity, less the cost of gathering it. This, of course, was not a proper foundation, because it eliminated the chance of hail, wind-storms, early frosts and other factors possible in the growth of a crop between July and the days of its maturity. Defendants, however, did not ask any instruction on this point, and the evidence was not so absolutely incompetent as to warrant its exclusion on a motion to strike it from the record. Experience teaches us that jurors take testimony as to the amount of damages, or from whence damages may be computed, as advisory, and their verdicts demonstrate they mingle therewith a large percentage of common sense. In the instant case the jury did not bring in a verdict equal in amount to a computation based on the lowest price per acre of the crops as shown by the testimony, and we think defendants are not in position to make complaint on this branch of the case.

3. Complaint is made that the court improperly instructed the jury that the gist of the action was defendants' alleged negligence and want of proper care in the construction of their bridge across the Nemaha, and that the jury's attention was not directed to the allegation that the embankments were negligently constructed. We think that the court might have been more explicit in referring to the embankments rather than the bridge, also that an instruction relating to the burden of proof and the measure of damages might properly have been given, but on the second trial of this case doubtless all those

details will be attended to. We might remark in passing that defendants seemed in nowise anxious that the case should be properly tried, nor did their attorneys do much to aid the trial judge in the proper discharge of his arduous duties, and, if it were not for the plain error heretofore referred to, we would be tempted to affirm the judgment.

4. It was argued at the bar that this cause should be affirmed because the verdict was the only one possible from a consideration of the competent evidence. We have read and reread the evidence, and reluctantly conclude that we cannot say a verdict in the exact amount returned by the jury is the only one logically possible herein. On the entire record, we are constrained to find that prejudicial error was committed in said trial, and we therefore recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

WILLIAM H. SCHNERINGER ET AL., APPELLANTS, v. HALL B. SCHNERINGER ET AL., APPELLEES.

FILED MAY 7, 1908. No. 15,125.

1. **Constructive Trusts.** Where a mother during her last illness, believing that she will not recover, conveys all of her real estate to her husband at his request, and upon his oral promise to devise said real estate to their demented child and care for him during the father's natural life, though no express trust is created, a court of equity may interpose to prevent a wrong, and declare the grantee a trustee *ex maleficio* for the protection of the grantor's intended beneficiary.

2. ———: In the foregoing case, the father, the day succeeding the

execution of the deed, made a will complying with that part of his agreement. *Held*, That the deed and will were parts of the same transaction, and that the grantee will not be permitted to revoke the will or incumber or dispose of said real estate to the detriment of his incompetent child.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Reversed with directions.*

Sullivan & Squires, for appellants.

A. Wall and *C. L. Gutterson, contra.*

ROOT, C.

January 8, 1905, Missouri J. Schneringer departed this life, leaving surviving her husband, the defendant Hall B. Schneringer, and eight adult children, including the plaintiff Mark, who is mentally and physically incompetent. August 29 preceding her death she conveyed by warranty deed to her husband a half section of land in Custer county, which is the bone of contention here. The children other than Mark claimed that their mother was tricked and defrauded by their father into making the deed, and that she believed at the time of its execution, and died in the belief, that said instrument was a will whereby she had provided for their brother Mark. Six of the children executed deeds for said land to their brother William as trustee for their demented brother, and this action was brought by said trustee, joining Mark as plaintiff, and against the father and a second wife, to have said deed canceled and held for naught for the reasons aforesaid. After all the evidence had been introduced the court permitted plaintiffs, over defendants' objections, to file an "amended and supplemental petition," charging that since the commencement of the action plaintiffs had learned that their father claimed he had taken the title to said land for his own benefit during his natural life and in trust for the support of Mark, and upon the parent's death the fee simple title to vest in said son; that Hall B. Schneringer had executed a will

in conformity with the trust, but had thereafter married and had mortgaged the land, and with the proceeds had purchased 80 acres of land as a present for the second wife, and that she claimed dower and homestead rights in the Missouri J. Schneringer land; that Hall B. Schneringer had incapacitated himself from administering the trust, and plaintiffs prayed that he be held as trustee *ex maleficio,* and for equitable relief. The last pleading seems to have been filed as an amendment to the original petition. The district court found generally for defendants and dismissed the petition, and plaintiffs appeal.

1. From a consideration of the evidence we find the facts to be that the southeast quarter of section 7, in township 15, range 23, was entered by defendant as a tree claim, and that after a patent was issued he conveyed said land through a trustee to his wife in consideration that she would join with him in mortgaging their homestead to secure money for defendant's use; that defendant purchased the east half of the northeast quarter of said section 7, and the south half of the southeast quarter of section 6, in said town and range, in 1898, and that the vendor at defendant's direction conveyed the land direct to Misssouri J. Schneringer for the purpose of hindering and delaying defendant's creditors in the collection of his debts; that plaintiff Mark Schneringer has heretofore been, and in all probability during his natural life will be, physically and mentally incompetent. The mother's affections seem to have been centered in her unfortunate child, and she sought by every means within her power to minister to his comfort during her life and to provide for his maintenance after her death. Mrs. Schneringer about the month of July, 1904, was stricken with dropsy and heart disease, and died in January following. She knew her illness was mortal, and with that understanding entered into an arrangement with her husband, and at his request conveyed the farm to him that he might have a home during his declining years safe from the claims of their children other than Mark, and

to the end that Mark should be cared for and supported by his father so long as the parent should live, and with the further oral agreement that the father should will the farm to said son. Mark Schneringer, Sr., defendants' brother, was mutually selected by the parents as guardian for their afflicted son. In conformity with this agreement, Missouri J. Schneringer on the 29th day of August signed and acknowledged a deed conveying the farm to her husband, and the succeeding day he executed his last will and testament, and thereby devised and bequeathed to his son Mark all and singular his estate, real and personal, and provided that, if the wife survived the husband, she should have the use of the estate during her life, subject to the support of Mark, and upon her death the estate should vest in said son. It does not appear that the will has been revoked. Thereafter Hall B. Schneringer married the defendant Mary M. Schneringer, and mortgaged the tree claim for $800 to raise money, which he used in purchasing 80 acres of land for his second wife. The evidence does not establish the description of said tract.

Hall B. Schneringer has supported his son Mark since Missouri's death, but he has denied the trust, and is unlawfully encumbering the estate, so that the *cestui que trust* is entitled to relief. Hall B. Schneringer strenuously denies making any such arrangement with his wife, or that she requested him to care for Mark, or make the will he did, or any other will, but the circumstances as shown by the evidence point unerringly to the conclusions we have adopted. The deed was prepared by Mr. Brega, a lawyer and notary, who was called by defendant as a witness, and on cross-examination, without any objection from defendant, he testified that Hall B. Schneringer came to him some days before the deed was made and talked over the transaction; that Brega suggested that the wife make a will, but finally it was settled that a deed from the wife and a will by the husband should be executed. "He came to me to have the papers made out,

and wanted a will and wanted to make a deed, and he told me he wanted to do that, and he told me, if his wife outlived him, he wanted her to have a deed, and, if he outlived her, he wanted to have a deed so it would go in the end to the boy. * * * I can't remember the words he used. He wanted me to fix it so that, if he outlived his wife, he would have the use of the land, and, if his wife outlived him, she would have the use of it, and in the end it would go to the boy Markie." Witness says he understood that the will and deed were parts of one transaction. About that time defendant called on his brother Mark, and told him that "Jane," the wife now deceased, wanted him to act as Markie's guardian, and he finally agreed to do so. Prior to making the deed the mother expressed great concern over Markie's future, and contemporaneous with the execution of the deed and at intervals thereafter expressed herself as ready to die; that she was satisfied, because she had provided for Markie; that a will had been made willing the land to him, and that his uncle Mark had been appointed guardian. It also appears that before this time the husband had earnestly and unsuccessfully importuned his wife to convey the land to him. She was illiterate, reading and writing with great difficulty, and we do not doubt she believed the will her husband made was irrevocable. We are satisfied that the husband was an active factor in securing title to the land, and that the wife signed the deed upon his explicit promise to devise the real estate to said son and to care for him during the father's natural life. Not only were the deed and will parts of one transaction, but the former was secured by reason of the confidential relations existing between the grantor and grantee, and while the grantor was in contemplation of death, and was made for the purpose of distributing the grantor's estate among those nearest her heart, the husband and her afflicted child. In all human probability, if defendant had not remarried, he would have held the land unincumbered for the benefit of himself and his son Mark, but he has

violated his promise, mortgaged the land, and ignored the trust. A plainer case for equitable relief was never presented to a chancellor, and a decree should be entered to make effective the dying mother's provision for her demented child. *Smullin v. Wharton,* 73 Neb. 667; *Hoge v. Hoge,* 1 Watts (Pa.), 163, 36 Am. Dec. 52; *Gilpatrick v. Glidden,* 81 Me. 137, 10 Am. St. Rep. 245; *Ahrens v. Jones,* 169 N. Y. 555, 88 Am. St. Rep. 620; *Laird v. Vila,* 93 Minn. 45, 106 Am. St. Rep. 420. Under the circumstances, the second wife is not seized of any dower, homestead or distributive interest in said land, but, on the contrary, the 80 acres presented to her by her present husband should be impressed with a lien as security that the $800 mortgage placed on the Missouri J. Schneringer land shall be released.

Defendants insist that William Schneringer is not a proper party plaintiff. The petition sufficiently alleges the incompetency of Mark Schneringer, Jr., and we are of opinion that William may and will be considered as the next friend of his coplaintiff. *Wager v. Wagoner,* 53 Neb. 511. Plaintiffs have filed a brief with 74 pages of an abstract of the evidence, which defendants challenge as incorrect. Because counsel have not agreed upon this point, we have read the bill of exceptions, and the cost of printing those 74 pages of the brief will be taxed to plaintiffs.

It is recommended that the judgment of the district court be reversed and the cause remanded, with direction to the district court to take testimony to establish the identity of the land purchased by Hall B. Schneringer for Mary M. Schneringer with the proceeds of the mortgage referred to in this opinion, and then that it enter a decree not inconsistent with this opinion.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed

and the cause remanded, with direction to the district court to take testimony to establish the identity of the land purchased by Hall B. Schneringer for Mary M. Schneringer with the proceeds of the mortgage referred to in this opinion, and then that it enter a decree not inconsistent with this opinion.

REVERSED.

LORENZO W. BILLINGSLEY ET AL., APPELLANTS, V. ROY E. DUTTON, APPELLEE.

FILED MAY 7, 1908. No. 15,181.

1. **Appeal:** CONFLICTING EVIDENCE. Where the evidence is conflicting it will not be examined further than to see that there is sufficient to justify the conclusion reached.
2. **Trial:** INSTRUCTIONS. Where an instruction is requested, the substance of which is contained in other instructions given, it is not error to refuse such requested instruction.
3. **Appeal:** DISCRETION OF COURT. The latitude allowed counsel during the trial of a cause is a matter resting largely in the discretion of the trial court. An appellate court will not, in the absence of clear abuse of discretion by the trial court, avoid its determination of the actual effect of any improper conduct during the trial.
4. ———: INSTRUCTIONS. And especially so when the court instructs the jury "that they should disregard all statements of counsel made during the trial or argument of this case to the jury that are not founded on the evidence."

APPEAL from the district court for Red Willow county: ROBERT C. ORR, JUDGE. *Affirmed.*

Billingsley & Greene, W. S. Morlan and *P. F. Greene*, for appellants.

Starr & Reeder, contra.

ROOT, C.

This is a suit for a balance of some $1,800 claimed to be due plaintiffs from defendant for attorney's fees and

for money necessarily paid out and expended for expenses and costs in attending to defendant's litigation and business. Plaintiffs had judgment for $180, and they appeal.

1. Plaintiffs argue that the verdict is contrary to the instructions of the court, the issues and the evidence; that either they should recover the amount claimed in the petition or defendant should have recovered costs. The testimony is conflicting. According to plaintiffs a contract was made between the parties hereto in plaintiffs' office on the 18th day of June, 1904, whereby defendant agreed to pay them a retainer of $1,000, and, in addition, $25 a day for all time necessarily devoted by plaintiffs to defendant's business and litigation, and also for all money advanced by plaintiffs for costs and expenses in and about said litigation. Defendant claimed that he made a contract with plaintiff Billingsley for said firm in defendant's office about the 30th day of June, 1904, by the terms of which he was to pay plaintiffs $200 and expenses for printing a brief, and, if the litigation and business terminated favorably for defendant, then he was to pay a reasonable fee in addition for the work done, and, if not successful, plaintiffs should receive nothing further from him. Plaintiffs did not succeed in their undertaking, which was to keep the United States mails open for the use of defendant in disseminating literature and correspondence relating to "psychic science." Plaintiffs received the $200 and defendant paid for printing a brief. Plaintiffs rendered some services for defendant between the 18th and 30th days of June, 1904, for which they sent him a statement for $180. Evidently the jury intended to compensate plaintiffs for that work, and the verdict was possible under the issues and the evidence.

2. Plaintiffs complain that the court did not specifically refer in its instructions to the alleged agreement of defendant to pay a retainer fee of $1,000. The court in general terms instructed the jury that the action was one to recover a balance on account, for attorney's fees, and

for money advanced for costs and expenses for defendant in the sum of $2,009.17, less a credit of $233. Plaintiffs' exception to this instruction was general, nor did they tender one more specific, and they ought not now to complain. *Henney Buggy Co. v. Ashenfelter,* 60 Neb. 1. The court did not err in refusing to give plaintiff's instruction numbered 5, as the subject therein treated is fully covered by instructions numbered 7 and 8, given by the court on its own motion. *Spaulding v. State,* 61 Neb. 289.

3. The alleged misconduct of counsel for defendant and the court's rulings in regard thereto will not justify reversing the judgment. The court might with propriety have held a tighter rein than it did, but the subject was largely within its discretion. *Pearsall v. Tabour,* 98 Minn. 248. Moreover, the court instructed the jury "that they should disregard all statements of counsel made during the trial or argument of this case to the jury that are not founded on the evidence."

Upon an examination of the entire record, we do not find error prejudicial to plaintiffs, and we therefore recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FIRST NATIONAL BANK, APPELLANT, V. HENRY BROWN, APPELLEE.

FILED MAY 21, 1908. No. 15,237.

1. **Notes:** DEFENSES. Evidence stated in substance in the opinion, and *held* insufficient to establish the defense interposed by the answer.
2. **Trial:** EVIDENCE: INSTRUCTIONS. In an action on a promissory note, where no competent evidence is produced tending to prove the defense of payment by delivery of property to a third person, it is error for the court to submit that issue to the jury.

APPEAL from the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

H. M. Sinclair and *E. A. Cook,* for appellant.

John H. Linderman and *G. W. Fox, contra.*

BARNES, C. J.

The plaintiff brought this action on a promissory note executed to it by the defendant Henry Brown and the Standard Beet Sugar Company of Ames, Nebraska. Brown was the only defendant served with process. The petition was the ordinary declaration on a promissory note. The answer contained an admission of the execution and delivery of the note sued on, and a denial of all of the other allegations of the plaintiff's petition. It further outlines two defenses: First, That the money which the defendant obtained from the bank, and for the repayment of which the note in suit was given, was the money of the Standard Beet Sugar Company, and was advanced to him under a contract by which he was to raise beets and deliver them to that company on the railroad track at Lexington, Nebraska, for which he was to receive $5 a ton; that, in order to assist him in raising the beets and paying for the hand labor required for that purpose, the beet sugar company was to advance him a sufficient amount of money to pay for said labor; that the $420 for which the note was given was so advanced to him under the contract, and that he had delivered a sufficient amount of beets to the Standard Beet Sugar Company on the railroad track at Lexington, Nebraska, to repay the same. Second. That at the time he gave the note in suit the hand labor necessary to raise his crop of beets had been performed; that the laborers were demanding payment for their work, and that the agent of the Standard Beet Sugar Company, one C. H. Powell, went with defendant to the bank, and assisted him in procuring the money with which to pay said laborers; that the Standard

Beet Sugar Company, by its said agent, signed the note in suit with him; and that it was then agreed between the plaintiff, the defendant and the agent of the said sugar company that the beets which defendant had raised should be delivered on the railroad track at Lexington to the plaintiff and the beet sugar company; and that delivery of a sufficient amount of beets for that purpose should be considered and taken as payment of said note. The plaintiff, by its reply, denied the affirmative allegations of the answer, and a trial resulted in a verdict for the defendant. After overruling the plaintiff's motion for a new trial, the court entered judgment on the verdict, and the case is brought here by appeal.

Plaintiff's first contention is that the evidence is not sufficient to sustain the verdict; and we think this contention is well founded, as we shall presently see. The burden of proof in this case was on the defendant to establish his affirmative defenses, or at least one of them. Keeping this in view, we come now to a consideration of the evidence. It appears that in the spring of 1905 one F. J. Rosenberg and the Standard Beet Sugar Company entered into a contract by which Rosenberg was to raise 40 acres of beets for said company; that he was to deliver the same to the company on the railroad track at Lexington, Nebraska, for shipment to the sugar factory, which was situated at Ames, in said state; that he was to receive $5 a ton for all beets so delivered by him; that the company agreed to furnish him seed and machinery, and deduct the expense thereof from the amount to become due him for beets delivered under the contract; that the company agreed to furnish him money to pay for the hand labor required in raising his crop; that the defendant Brown was Rosenberg's tenant, and thereafter took over the contract and raised the beets therein mentioned; that on or about the 16th day of November, 1905, at which time the crop, then fully matured, had been harvested and placed in silo awaiting cars for shipment, it became necessary for the defendant to pay his hand laborers; that

the agent of the Standard Beet Sugar Company thereupon went with the defendant to the plaintiff bank, and assisted him in borrowing the sum of $420, for the repayment of which the note in suit was given; that at the request of the beet sugar company the plaintiff took the note in question, secured by a chattel mortgage on the beets, which were then in silo as above stated, and thereupon the defendant gave the plaintiff the following order: "Lexington, Neb., Nov. 16, 1905. Standard Beet Sugar Company, Leavitt, Neb. Gentlemen: Please pay to the First National Bank of Lexington, Nebraska, $420 out of the first money due me for beets shipped to you. Henry Brown." It further appears that thereafter Brown delivered his crop of beets, which was sufficient in amount to more than pay the note in suit, to the Standard Beet Sugar Company on the railroad track at Lexington. It also appears that the company never paid defendant in full for the beets in question, but still owes him a sum equal to or greater than the amount of said note; that the company never paid the bank the money due the defendant for his beets; and that neither the note in suit not any part of it has ever been paid by any one to the plaintiff. The testimony shows, without contradiction, that the money loaned to the defendant was not the money of the Standard Beet Sugar Company; that it had no funds in the plaintiff bank, and that the loan was made direct from the plaintiff to the defendant. This disposes of the first defense outlined by the answer.

We come now to consider the contention that the beets were delivered by the defendant to the plaintiff bank and the Standard Beet Sugar Company. We find no evidence in the record tending to establish that fact. On the contrary, Brown testified in his own behalf that Powell was a field man for the Standard Beet Sugar Company; that the company was to pay him $5 a ton, and he was to deliver his beets on the track at Lexington, Nebraska, to that company; that he raised probably 500 tons of beets, and, on being asked what he did with them, he stated that

he delivered them here on the track, meaning at Lexington. When asked who received them, he stated that they were weighed by Powell's agent. When asked whom he delivered them to in regard to the Standard Beet Sugar Company, he answered C. H. Powell. The president of the plaintiff bank testified, in substance, that no arrangement ever existed between Mr. Brown and the bank about the delivery of the beets to that institution; that no beets were ever delivered by Brown to the bank, and that he was not consulted in any way in reference to the delivery of the beets. The cashier of the bank, the person with whom the business in question was transacted, stated that no beets were ever delivered by Mr. Brown to the First National Bank, or to any one for him; that there was no conversation between himself and Brown about the delivery of beets to the bank, or to the bank and the Standard Beet Sugar Company. C. H. Powell, the agent of said company, testified, in substance, that the persons engaged in receiving and weighing defendant's beets were employees of the sugar company. And so it may be said that the evidence conclusively shows that no beets were ever delivered by the defendant to the plaintiff bank, or to the bank and the beet sugar company jointly, but that they were all delivered to the Standard Beet Sugar Company; that the money loaned, as evidenced by the note in suit, was loaned by the plaintiff bank to the defendant Brown, and has never been repaid. It thus clearly appears that the defendant failed to produce any evidence of the fact which he was required to show in order to establish payment of the note in suit, and therefore the evidence does not sustain the verdict.

It is also contended that the court erred in giving instruction No. 6, on his own motion. While it is unnecessary to discuss this assignment, yet it may not be out of place to do so. By the instruction complained of the jury were told, in substance, that, if they found there was a delivery by the defendant of his crop of sugar beets to

the plaintiff and the Standard Beet Sugar Company jointly they should find for the defendant. As we read the record, there was no evidence before the court upon which this instruction could be predicated, for the defendant failed to produce any competent evidence showing or even tending to show such joint delivery; and the trial court therefore erred in submitting that question to the jury by the instruction complained of.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

R. J. B. WATERS, APPELLANT, V. M. L. PHELPS, APPELLEE.

FILED MAY 21, 1908. No. 15,196.

1. **Parol Evidence:** CONTRACT. A simple receipt is only *prima facie* evidence of the facts recited therein and may be explained by oral evidence, but when, in addition to a receipt, the paper also contains a contract of the party signing it, such contract stands on the same footing as other written contracts, and it cannot be varied or modified by parol in the absence of a showing of fraud in obtaining it.
2. **Real Estate Agents:** CONTRACTS. A contract for the sale of real estate, made by the owner to a real estate agent, must be regarded and construed as like contracts between other parties, and the fact that it provides for deducting from the agreed purchase price a sum designated as "commission" to be allowed by the vendor does not render it objectionable to the provisions of section 10856, Ann. St. 1907.
3. **Vendor and Purchaser:** ACTION: EVIDENCE. In a suit to recover from a real estate agent an alleged balance of the purchase price of a farm sold to him, evidence that at the time of the sale he was plaintiff's agent for the sale of the farm and had an offer therefor in excess of the price for which he made the purchase is irrelevant and immaterial. If the plaintiff wished to recover on account of the fraud and misconduct of the agent, his suit should be framed on that theory.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

C. A. Robinson and *J. F. Walker,* for appellant.

Edwin E. Squires, contra.

DUFFIE, C.

In his petition the plaintiff alleges that in March, 1905, he sold to the defendant his farm in Buffalo county, Nebraska, for $5,000; that he perfected the sale by a sufficient deed of conveyance, and that the defendant has paid him $4,850 only, and refuses to pay $150, the remainder of the purchase price. The defendant's answer alleges that about March 9, 1905, the plaintiff entered into a contract with him, whereby he sold to the defendant the farm described in the plaintiff's petition for the sum of $5,000, less the amount due upon a mortgage existing against the premises, and less the sum of $150 to be allowed the defendant as a commission; that a memorandum was made in writing and signed by the plaintiff at the time, which is in words and figures as follows: "Shelton, Nebraska, March 9, 1905. Rec'd of M. L. Phelps, five hundred dollars ($500) part payment of purchase price of $5,000 for my farm, N.W. ¼, of sec. 22, town 11, R. 13 West 6 P.M., less five acres sold and deeded. The balance of purchase price less a mortgage at $900, and M. L. Phelps' Com. of $150 to be paid on or before April 1, 1905, when possession is given. R. J. B. Waters." Defendant alleges that he has performed all the conditions of said contract on his part, and paid the plaintiff the full purchase price according to the contract. For a second defense, the answer alleges that about the 1st of April, 1905, the plaintiff executed and delivered to him a deed of the farm; that before the transaction was closed a difference arose between the parties as to the meaning of the above memorandum, and as to whether defendant, under said contract, was entitled to the $150 mentioned as commission; that the difference between them was fully discussed, and a complete settlement there had; that pursuant to said settlement it was agreed that defendant was

entitled to deduct from the purchase price of the farm the $500 paid at the date of the memorandum, the $150 mentioned as commission, and the sum of $956.97 found to be the amount due upon the mortgage mentioned in the memorandum; that the sum of $3,393.03 was the full balance then due the plaintiff on said contract of sale, which the defendant paid and the plaintiff accepted in full settlement of the contract. The plaintiff filed a reply, alleging that he is unable to read writing; that he signed the receipt or contract set out in defendant's answer relying upon the representations of the defendant that it was a receipt for a portion of the purchase price of his farm; that defendant falsely and fraudulently represented to him that the receipt contained no other or different contract or agreement, and that, relying upon said representations he signed the receipt. The reply also contains a denial of all new matter contained in the answer. A trial to the jury resulted in a verdict for the defendant, and, from a judgment entered thereon, the plaintiff has appealed.

"Plaintiff insists that the memorandum set out in the defendant's answer is merely a receipt and subject to explanation by oral evidence. It is well settled that a simple receipt is the only *prima facie* evidence of the truth of the statements recited therein, and that oral evidence is admissible for the purpose of explaining, varying or modifying its terms; but a receipt may also contain a contract, and a contract embraced in a writing which also acknowledges the receipt of money stands upon the same footing as other written contracts, and cannot be varied or modified by parol. *Morse v. Rice,* 36 Neb. 212, and cases cited at page 215. The memorandum referred to contains an explicit contract of sale which a court of equity would specifically enforce, and the objection made that the $150 referred to in the memorandum as commission falls within the prohibition of section 10856, Ann. St. 1907, making void all contracts between the owner of land and an agent employed to sell the same which is not

reduced to writing and subscribed by both parties, cannot be sustained. That section was not intended to apply to a sale made by the owner directly to a real estate agent, and has no application whatever to cases of the character we are considering. It is only where the owner lists land with a real estate agent to be sold to other parties that a written contract signed by both parties and describing the lands and setting forth the commission to be paid for the agent's services is required. A sale made by the owner to a real estate agent rests upon no different footing from a sale made to any other party, and the fact that the contract allows the purchaser to deduct from the named purchase price a sum called a commission will not avoid the contract, though signed only by the vendor. The contract of sale evidenced by the memorandum could be avoided by the plaintiff, only, by showing fraud on the part of the defendant in procuring it. The record is quite barren of any fraud practiced by the defendant, and the verdict of the jury, in the state of record, must be accepted by this court as conclusive upon that question. There is also evidence tending strongly to show that, when the deed was made, a dispute occurred relating to this item of $150, and that the matter was finally settled between the parties with a full understanding of all the facts, and a transfer of the land and a payment of the money made in accordance with this settlement.

Complaint is further made by the plaintiff that the court refused evidence offered to show that, prior to the making of this contract, the land had been listed with the defendant for sale and that he had secured a customer at the price of $5,500. Under the issues made by the pleadings this evidence was immaterial. The action was not brought to recover from the defendant on account of misconduct on his part while acting as the plaintiff's agent for the sale of this land. It is well settled that an agent cannot make a valid purchase from his principal while that confidential relation exists, without fully and fairly disclosing to his principal all the propositions he has re-

ceived and all the facts and circumstances within his knowledge in any way calculated to enable his principal to judge of the propriety of the sale. *Moore v. Mandlebaum,* 8 Mich. 432. Had the action been brought for fraud and deceit on the part of Phelps while acting as the agent of the plaintiff, the evidence offered would be proper and material in establishing a cause of action against the defendant either to set aside the contract of sale or to recover from him any amount for which he had contracted a sale of the land prior to himself making the purchase. The action, however, was for a part of the $5,000 for which the land was sold, and the only question in issue was the right of the defendant to deduct the $150 from the agreed purchase price. The evidence fairly supports the verdict, and we discover no error on the part of the court in the conduct of the trial.

We recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN H. WILLIAMS, APPELLEE, V. WILLIAM B. WIGHTMAN ET AL., APPELLANTS.

FILED MAY 21, 1908. No. 15,201.

Fraud: EVIDENCE. A owned a stock of goods valued at $2,800. B owned land in a county distant from the residence of A, which he represented that he had sold to C for the sum of $3,200, of which sum $200 had been paid and $3,000 was to be paid in about three months. A transferred his stock of goods to B at the agreed price of $2,800, and took an assignment of the contract evidencing the sale of the land of B to C. C failed to pay the $3,000 due on the land contract when it matured, and A commenced an action against B to recover the value of his stock of goods, alleging that he took an assignment of the contract as security only, and,

further, that the contract entered into between B and C for a sale of B's land was not a *bona fide* contract, but a pretense and a fraud, and made for the purpose of being used to trade A out of his stock of goods; that the land was of poor quality, and not worth to exceed $500. There was evidence tending to show that the land, to defendant's knowledge, was of poor quality; that C had bought the land without knowledge of its character or value; that he was a renter of the agent of B who made the sale, and presumably of little financial standing or ability; that A, when he took an assignment of the contract, had no knowledge of the character of the land or its value; that he had no acquaintance with C, and was ignorant of his financial ability to carry out his contract for the purchase of the land or of his character for honesty and integrity. *Held*, That the evidence was sufficient to sustain a verdict in favor of the plaintiff.

APPEAL from the district court for Harlan county: ED L. ADAMS, JUDGE. *Affirmed.*

Gomer Thomas and *Keester & Myers*, for appellants.

J. G. Thompson and *John Everson, contra.*

DUFFIE, C.

In February, 1906, the plaintiff Williams owned a stock of general merchandise at Stamford, Nebraska, and the defendant Wightman was the owner of 320 acres of land in Logan county, Nebraska. The plaintiff's petition is quite vague in its allegations, but we gather from the statements contained therein that Wightman represented that he had negotiated a sale of his Logan county land to one Clary for $3,200, of which $200 was paid in cash, and the remainder of $3,000 was to be paid May 20, 1906; that Wightman would assign to the plaintiff the contract evidencing the purchase of his land by Clary as security for the purchase price of plaintiff's stock of merchandise, estimated to be worth $2,800. The petition further alleges that Wightman represented the land to be worth $3,200; that it was level, and first-class soil; that it was not, in fact, worth to exceed $500; that the pretended sale to Clary was a fraud, and was drawn up and presented to

plaintiff with the intent to deceive him and to wrongfully obtain possession of his stock of goods; that Clary was in collusion with the defendant, and fraudulently signed the said contract, and lent his influence and aid in perpetrating the fraud; that, relying on the representations made, he traded with defendant, and turned over to him his stock of merchandise. The answer denies any false representation in regard to the quality of the land; and alleges that the contract entered into between himself and Clary for a sale of the land was assigned to the plaintiff in full payment for plaintiff's stock of goods; the plaintiff executing an agreement to pay to the defendant $200 out of the $3,000 called for by said contract when the same was paid by Clary. The case was tried to a jury which returned a verdict in favor of the plaintiff for $2,800, the agreed value of his stock of goods.

The case was tried and submitted to the jury upon the theory, first, that the land contract had been assigned to the plaintiff as security only for the payment of $2,800, the agreed value of plaintiff's stock of merchandise; and, second, that the contract for the sale of the Logan county land to Clary was a pretense and a fraud; that the land was of little value, and the contract made, not for the purpose of evincing a *bona fide* sale, but to be used in trading the plaintiff out of his stock of goods. The evidence contained in the bill of exceptions is amply sufficient to support the findings of the jury upon either theory. The land is apparently of little value. Clary, the vendee in the contract of sale, was not a witness in the case, but the inference arising from the evidence is that he is a man of little or no financial means, a renter of the agent of the defendant who sold him the land or who procured him to sign the contract of sale. He never saw the land, and apparently had no knowledge of its quality or value, and, according to the evidence of the agent who made the sale, was purchasing for his father, who at the time resided in Colorado or Oklahoma. We cannot believe that a party purchasing either for himself

or for his father would contract to pay $3,200 for land which he had never seen and of the value of which he had no knowledge. Neither is it probable that the plaintiff would accept in payment for his stock of goods a contract of this character, knowing nothing of the value of the land described in the contract, and having no knowledge of the financial standing of the vendee in the contract. The evidence is clear that the plaintiff at the time of taking the assignment of this contract had never seen the land, which was something like 100 miles from his place of residence; that he knew nothing of its value, and had no knowledge whatever of the financial condition of Clary, whose contract of purchase the defendant claims was taken in payment for the stock of merchandise, or of his character for honesty and integrity. Wightman remarked to one of the witnesses, when informed that Williams had gone to Logan county to see the land, that "Williams would wish he had never seen it."

The circumstances all go to support the plaintiff's theory of the case, and the verdict of the jury has ample support in the evidence contained in the bill of exceptions. We recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE C. CARSON, APPELLEE, V. CITY OF HASTINGS, APPELLANT.

FILED MAY 21, 1908. No. 15,213.

1. **Pleading: DEMURRER.** In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant.

2. Cities: INJURIES: NOTICE. It is no sufficient objection to the notice required to be given a city of from 5,000 to 25,000 inhabitants of an injury received by a plaintiff in consequence of the defective and dangerous condition of a street of the city that it also contains a claim for damage for the injury.

3. ———: NOTICE. The sufficiency of such a notice in pointing out the place where the injury was received is to be determined, not alone from the wording of the notice, but in the light of extraneous evidence of the situation and surroundings.

APPEAL from the district court for Adams county: ED L. ADAMS, JUDGE. *Affirmed.*

W. F. Button, for appellant.

John C. Stevens, contra.

DUFFIE, C.

The plaintiff was injured by falling into an open and unguarded cellar-way located on Lincoln avenue in the city of Hastings, Nebraska. In an action brought against the city to recover for his injuries he alleges notice to the city of the time when, and the place where, the injury occurred, in the following language: "This plaintiff further alleges that within 30 days of the injury complained of herein he gave to the clerk of the city of Hastings, Nebraska, a written notice, setting forth the injury complained of, with a statement of the nature and extent thereof, and of the time when, and the place where, said accident occurred, which statement and notice was received by the clerk of the city of Hastings, Nebraska, the defendant herein; that a copy of the notice left with and served on the city clerk as above set forth is hereto attached and marked 'Exhibit A,' and the same is hereby made a part of this petition as fully as though it were set out herein verbatim." The notice, omitting the verification attached thereto, is as follows: "Claim of George C. Carson against the City of Hastings. State of Nebraska, Adams County, ss: George C. Carson, being duly

sworn, deposes and says that he is now, and has been upwards of 17 years, a resident and citizen of the city of Hastings, Adams county, Nebraska; that on the 10th day of December, 1904, while returning to his residence from his place of business, he was injured because of an excavation permitted to exist on a street of the city of Hastings, designated and known as Lincoln avenue; that said avenue is a public thoroughfare located in said city and maintained by said city, and that claimant was thereby induced to pass over the same, believing that there was no danger in so doing; that the city was negligent in this, that it permitted the owner of the building adjacent to the street to maintain an open cellar-way, into which, because of the darkness of the night and the absence of light, claimant fell, and was injured as hereinafter set forth; that claimant's face was badly bruised, his eyes and nose injured; that the injury to claimant's nose is, in his opinion, of permanent character; that he received injuries, because of the fall, to his head and back, which claimant believes to be permanent; that, because of said injury, claimant has been unable to follow his vocation up to the present time, and believes that he will be unable to obtain a position similar to the one he occupied, and the only one in which he is skilled to discharge the duties thereof; that claimant, prior to said injury, was receiving $12 a week for his services; that, because of his injuries received as above set forth, and the permanent character thereof and loss of time, claimant is damaged in the sum of $5,000. George C. Carson, By John C. Stevens, his Atty." A general demurrer was interposed to the petition, which was overruled by the court; whereupon the city filed an answer, and a trial to the jury resulted in a verdict for the plaintiff. Defendant has appealed.

Section 8538, Ann. St. 1907, in force at the time of plaintiff's injury, provides: "No city shall be liable for damages arising from defective streets, alleys, sidewalks, * * * within such city, unless actual notice in writing

of the accident or injury complained of, with the statement of the nature and extent thereof, and of the time when and the place where the same occurred shall be proved to have been given to the mayor or city clerk within thirty (30) days after the occurrence of such accident or injury." In *Schmidt v. City of Fremont,* 70 Neb. 577, we held that physical incapacity on the part of the injured party did not excuse giving the notice required by this statute, and that in the absence of the notice no recovery against the city could be had. The reasoning upon which this holding is based need not be repeated here, and we need only inquire whether the paper attached to plaintiff's petition as exhibit A, and referred to as the notice given the city, is sufficient to comply with the requirements of the statute.

The plaintiff insists that he was only required to allege in his petition that written notice of the time and place where the accident occurred was given the city, and that no copy of such notice was required to be attached to his petition, and that because of this the court should disregard the exhibit attached, and should dispose of the case as though the form and contents of the notice had not been referred to in his petition. In *Pefley v. Johnson,* 30 Neb. 529, it is said: "The facts on which a plaintiff bases his right to recover should be stated in a systematic and orderly manner, and not by making a mere exhibit a part of the petition. An exhibit, however, if made a part of a petition, is to be considered, and if the facts therein stated, in connection with those in the petition proper, show a liability of the defendant to the plaintiff, a demurrer that the facts stated therein are not sufficient cannot be sustained." This holding was approvingly quoted in *Hudelson v. First Nat. Bank,* 51 Neb. 557. These cases establish the rule that the statements contained in an exhibit attached to a pleading must be considered in connection with the allegations of the pleadings to which it is attached in determining its legal sufficiency, and, while the plaintiff was not required to attach to his

petition the form of notice given the city, having done so, we cannot ignore it.

The first objection made to the notice given the city is that in form and substance it is clearly a claim against the city for damages for a personal injury, and not the notice contemplated by the statute. In *Barribeau v. City of Detroit,* 147 Mich. 119, cited by the defendant to another point, the notice given by the plaintiff to the city of Detroit also contained a claim for damages and an offer of settlement; but the supreme court of Michigan did not hesitate to accept this as an attempt to give the statutory notice required to be given the city as a basis for maintaining an action, and held it insufficient only on the ground that the place of the accident was not sufficiently described. We can see no objection to the same paper performing the dual duty of notice to the city and a claim for damages for a personal injury sustained.

The main objection urged against this notice is that it does not specifically point out the place where the accident occurred. In the absence of an authoritative decision of the requirements of our statutes, we would be disposed to hold that the notice given the city should describe the place of the accident with such technical accuracy that the court as a matter of law, when the notice is offered in evidence, could say that it was legally sufficient, or that it was so indefinite in the matter of description that it should not be allowed in evidence. This was apparently the conclusion arrived at by the supreme court of Michigan in *Barribeau v. City of Detroit, supra.* In the body of the opinion in that case it is said: "But to be legally sufficient, a notice must contain a description of the place of accident so definite as to enable the interested parties to identify it from the notice itself." In *City of Lincoln v. O'Brien,* 56 Neb. 761, the notice given the city describing the time and place of the accident was as follows: "That on or about the 6th day of October, 1894, this affiant was passing on and over the sidewalk on the north side of Q between Eighteenth and

Twentieth streets, in said city, in the evening of said day, and stepped into a hole in said sidewalk, which was in a bad state of repair." Objection was raised to the sufficiency of the notice, in that it designates a space of two city blocks, and did not lead to any more precise location. In an extended opinion, in which numerous cases from other states were referred to and examined, the court apparently adopted the rule that the sufficiency of the notice is not to be determined from its terms alone, but in the light of extraneous evidence of the situation and surroundings. In the concluding part of the opinion it is said: "It is true that it appears that the plaintiff knew the exact location, and might have described it better in her notice. On the other hand, it is inferable from the evidence that the ruinous sidewalk was peculiar to that part of the street in front of this one lot. There is no proof that there were any holes elsewhere along the two blocks described, and we cannot presume that the city was so generally neglectful of its duty that there were other places where the sidewalk was in bad repair and contained holes which one might step into within the two blocks named. * * * Without indulging the presumption above adverted to, we must conclude that the notice thus furnished sufficient information to enable the city to identify the portion of the walk referred to, although perhaps not the particular hole. The city only claims that the notice should be so specific as to lead to identifying the lot in front of which the accident happened. From all that appears in the evidence it might here have done so." This case was cited and followed in *City of Lincoln v. Pirner*, 59 Neb. 634. The notice in that case described the place of the accident as being "In front of lot 13, in block 45, on 'P' street, in the city of Lincoln, near the west side of what is commonly known as the Carr Block." The accident actually happened in front of lot 34, eleven blocks distant from the place described in the notice. Judge SULLIVAN, in the opinion, says: "The Carr Block, according to the evidence, is a

well-known building on P street in the city of Lincoln, and the coal-hole described in the notice was near the west side of it. This being so, we cannot believe that any person possessed of ordinary powers of perception could have failed to locate the place of the accident, if he had made an honest effort so to do." These cases clearly establish the rule that the sufficiency of the notice will be determined, not alone from its wording, but in the light of extraneous evidence of the situation and surroundings.

In the case we are considering the evidence taken at the trial has not been preserved, and is not before us; the defendant relying entirely upon the wording of the notice to show its insufficiency. We have before us only the pleadings and the judgment. If the terms and the wording of the notice were alone to be examined in determining its sufficiency, we would have no hesitation in holding it fatally defective in not being more specific in pointing out the place of the accident. But the judgment of the trial court is presumably correct, and, as the evidence given on the trial must, under our former holdings, be taken into account in determining the sufficiency of the notice, we cannot as a matter of law, in the absence of the evidence, hold it insufficient.

We have no knowledge of the length of Lincoln avenue, the street on which the accident occurred. It may extend for one block only, or, if a greater distance, it may be that there was only one excavation along its whole length into which the plaintiff could have fallen. As observed in *City of Lincoln v. O'Brien, supra,* we cannot presume that the city was so grossly neglectful of its duty that there were other places where the street was in bad repair and other excavations into which the plaintiff might have fallen.

In the absence of a bill of exceptions, we can only presume that the evidence taken at the trial established facts showing that the city officials could not have been misled by the vague description of the place of the accident contained in the notice.

We recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN MORROW ET AL., APPELLEES, V. T. F. BARNES, APPELLANT.

FILED MAY 21, 1908. No. 15,200.

Trial: INSTRUCTIONS. A party is not entitled to a reversal of an adverse judgment because of a defective instruction, which, with another given at his request, fairly submits his theory of the case.

APPEAL from the district court for Furnas county: ROBERT C. ORR, JUDGE. *Affirmed.*

Perry & Lambe, H. M. Sinclair and *W. D. Oldham,* for appellant.

J. M. Mohney and *T. D. Leib, contra.*

EPPERSON, C.

Defendant appeals from a judgment obtained against him upon a promissory note. The defense was duress. The court gave to the jury an instruction, the objectionable part of which is as follows: "In order to find that the note sued on in this action was procured by duress, the defendant must satisfy you by proof and a preponderance of the evidence that at a short time previous to the execution and delivery of the note the plaintiffs * * * had threatened the defendant, T. F. Barnes, with arrest and prosecution for an alleged crime, * * * and that defendant had no adequate and ready redress for such threatened acts, and that the threats so made must have been of such a character as to naturally overcome the mind

and will of a person of ordinary firmness and deprive him for the time being of the power and will to resist the demand by the person making such threats." Late decisions of this court have followed a more liberal definition of the word "duress," and hold that this defense is sufficient if it is shown that by reason of threats or other unlawful means the defendant was deprived of his will and understanding, and that the contract sued upon was not his free and voluntary act. *Nebraska Mutual Bond Ass'n v. Klee,* 70 Neb. 383; *Iowa Savings Bank v. Frink,* 1 Neb. (Unof.) 14.

The appellant thinks it apparent that the trial court had read and followed some ancient and abandoned text-book. We find, however, that the trial court followed a suggestion of modern origin. The record discloses that the defendant, through his attorney then employed, requested an instruction containing the identical matters complained of in the instruction assailed. It is in part as follows: "If you believe from the evidence * * * that the defendant had no ready and adequate (redress), and that the plaintiffs threatened him with unlawful imprisonment and with unlawful criminal prosecutions, * * * and * * * by such threats excited and created a fear of grievous and irredeemable injury to his property, or of unlawful imprisonment, * * * and you further find that such threats so made by the plaintiffs, or either of them, are sufficient under the circumstances to overcome the will of a person of ordinary courage, and sufficient to induce such a person to execute and deliver the note sued on under such circumstances as proved, then your verdict should be for the defendant." This instruction also was given by the court. If the one complained of by the defendant is erroneous, it necessarily follows that the one requested by defendant also is erroneous. A party cannot complain of an error which he invokes. Following this rule, we find the action of the court does not call for a reversal. The instruction given

on defendant's request is somewhat broader than the other, in that it submitted to the jury the question as to whether or not the alleged threats created in the defendant a fear of unlawful imprisonment. The two instructions must be read together. No inconsistency is apparent. They fairly presented the theory of the defendant, and he cannot now complain.

Defendant suggests that the evidence is not sufficient to support the verdict. It would not be profitable to review the evidence at length in this opinion. We have read the record, and are convinced that the case was fairly tried upon the defendant's theory, and that the evidence sustains the verdict.

We recommend that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

H. C. SEELE ET AL., APPELLANTS, V. LINCOLN PHELPS, APPELLEE.

FILED MAY 21, 1908. No. 15,218.

1. **Appeal:** EVIDENCE. When a licensing board, upon the hearing of a remonstrance against the issuing of a liquor license, refuses to receive a part of the testimony offered by the remonstrators, an offer of proof should be made, that the apellate court may determine whether or not its rejection was erroneous or prejudicial.

2. **Intoxicating Liquors:** LICENSE. The statute does not prohibit a licensing board from granting the application for a liquor license before the payment of the license fee. The board may, in the absence of an ordinance providing otherwise, order that the license be issued upon the payment of the fee; and, if such a condition is not made a part of the order, the law imposes the same, and will not permit the issuing of the license until the fee is paid.

1. ———: ———: An application for a liquor license will not be rejected because the officer with whom it was filed removed from the municipality, thereby making it inconvenient or impossible for the public to see the application, unless it is disclosed that these facts were prejudicial to the remonstrators or to other interested parties.

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

E. Ross Hitchcock and *George A. Adams,* for appellants.

D. W. Livingston, contra.

EPPERSON, C.

The appellee presented to the board of trustees of the village of Burr a petition for a liquor license signed by a majority of the resident freeholders of said village. A remonstrance was filed by the appellants, protesting against the issuance of said license for the reasons: First, that the board was without authority to grant the license; second, that said applicant had during the past year violated the provisions of the liquor law by selling to habitual drunkards and minors; third, that the applicant had during a part of the preceding year maintained a saloon in said village, in which he kept for sale and did sell intoxicating liquors without a license. Prior to the hearing the board made an order requiring remonstrators to make more specific certain of their objections. This order was not complied with. Witnesses testified in behalf of the applicant as to his good character and standing, although the same was not directly assailed. On cross-examination remonstrators sought to prove that the witnesses had heard that the applicant had purchased and operated a saloon in said village for about six months during the preceding year, and further offered to show "that within the knowledge (of the witness), and by other information, the applicant has violated the laws within the past year." Such evidence was rejected by the village

board. It is apparent that this offer of proof was indefinite, and that the evidence offered was therefore incompetent.

Upon the conclusion of the applicant's evidence remonstrators called a witness, who was sworn, but not permitted to testify, for the reason that remonstrators had not complied with the order of the board requiring them to make their objections more definite and certain. No tender of proof was made, and we are unable to judge the competency of the evidence they were prepared to give. It is the rule that, where a licensing board fails to receive competent evidence, the case will be remanded, and the board directed to hear the evidence. But we are unable to say whether or not the remonstrators had evidence which they were entitled to produce. They should have made their offer. Then, had it been rejected by the board, the appellate court could determine whether or not its rejection was erroneous or prejudicial. Four of the five remonstrators, when called as witnesses in behalf of the applicant, testified that their only reason for opposing the application was that they favored two saloons instead of one. One of the appellants had been refused a license by the same board; and this only, it seems, prompted this litigation. The atmosphere surrounding this case is not of the purest. It appears that the remonstrance was first prepared in opposition to the application of one of the remonstrators for a liquor license in another village, but it was changed by erasure and interlineation to oppose the appellee's petition. This is no ground for its rejection, but probably explains the remonstrator's failure to make their objections more specific and certain. The burden was upon the remonstrators to prove the specific allegations charged. No evidence was offered. The applicant proved jurisdictional facts.

It is contended that the board was powerless to grant the license, because the license fee had not been paid. Undoubtedly the village board would have no authority to issue the license until the fee was paid. However, we

do not consider that this question is before us. The statute does not prohibit the board from acting upon the application before the payment of the fee. It may allow the petition, and order that the license issue upon the payment of the fee; but, if such a condition is not made a part of the order, the law imposes the same, and will not permit the issuing of the license until the fee is paid. It is from the order of the board granting the petition that remonstrators appealed.

Complaint is made that the village clerk had removed from the village soon after the petition was filed with him, thereby leaving a vacancy in that office; but it is not disclosed that this fact was prejudicial to the remonstrators, or to any interested party.

We recommend that the judgment of the district court favorable to the applicant be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NEBRASKA HARDWARE COMPANY, APPELLANT, V. HUMPHREY HARDWARE COMPANY ET AL., APPELLEES.

FILED MAY 21, 1908. No. 14,995.

1. Contract: CONSTRUCTION. In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relations of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. The court will, so far as possible, put itself in the place of the parties and interpret the contract in the light of the circumstances surrounding them at the time it was made and the object which they had in view.

2. ———: ———. As a general rule, where two written instruments

relate to the same subject matter, one signed as a condition to the signing of the other, and both signed at about the same time, they will be construed together as constituting a single writing.

3. Appeal: HARMLESS ERROR. This court will not consider assignments of error which are not prejudicial to the party making the assignment.

4. ———: CROSS-APPEAL. Parties to an action desiring to effect a cross-appeal in this court are required to file a brief of assignments of error within the time limited by statute for appealing.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Burkett, Wilson & Brown, for appellant.

Rose & Comstock, contra.

GOOD, C.

In 1902 the Humphrey Hardware Company, hereafter called the "Humphrey Company," was a Nebraska corporation having a capital stock of $30,000, divided into 300 shares of $100 each. Its capital stock was owned and held as follows: Sarah M. Humphrey, 100 shares; Cora H. Wheeler, 99 shares; Myron E. Wheeler, her husband, 1 share; Julia H. Herrick, 99 shares; and Charles M. Herrick, her husband, 1 share. Sarah M. Humphrey is the mother of Mrs. Wheeler and Mrs. Herrick. It will be observed that one-third of the capital stock was owned by Mrs. Humphrey, one-third by Mrs. Wheeler and her husband, and one-third by Mrs. Herrick and her husband. Mrs. Humphrey was the president, and Myron E. Wheeler was the secretary and treasurer, of the company. The Herricks were not on friendly terms with the other shareholders. Mrs. Herrick transferred her shares to one Chapman, to whom a new certificate of stock was issued. In 1903 Chapman assigned his certificate to Mrs. Herrick, but the Humphrey company refused to issue a new certificate to her on the ground that it had a lien upon the shares of stock. In April, 1903, Mrs. Herrick brought

suit against the Humphrey company for the conversion of these 99 shares of capital stock. Within a few days after the suit was brought the Humphrey company, apparently finding that it did not have a valid lien upon the stock, tendered to Mrs. Herrick a certificate of stock for the 99 shares, which she refused to accept. The action of Mrs. Herrick for conversion was still pending and undisposed of in September, 1905, when the Patterson-Crosby Hardware Company, hereafter called the "Patterson company," began negotiations for the purchase of the Humphrey company and its assets. These negotiations were carried on through one Webster, a broker, W. E. Jakway, vice-president of the Patterson company, acting for it, and Myron E. Wheeler, representing the interests held by Mrs. Humphrey, himself and his wife. At the inception of the negotiations Jakway was informed that Mrs. Humphrey and the Wheelers would not deal with him unless he first procured the Herrick interests, including a dismissal or settlement of the action for conversion. On September 14, 1905, Jakway obtained an option from the Herricks for their interests in the Humphrey company, including a dismissal of the action for conversion, and so informed Mr. Wheeler. Negotiations then proceeded with Wheeler for the other interests in the Humphrey company. Jakway prepared and submitted to Wheeler a proposed contract, dated September 19, 1905, to which Wheeler objected, claiming that it did not correctly set forth the terms of their agreement. Wheeler refused to sign the contract until Jakway would first sign an additional or supplemental agreement, which Wheeler prepared, dated September 20, 1905. This was accepted by the Patterson company, and then Mrs. Humphrey and the Wheelers signed the contract prepared by Jakway. The two instruments are as follows:

"This agreement made and entered into this 19th day of September, 1905, by and between the Humphrey Hardware Company, a corporation of Lincoln, Nebraska, Cora

E. Wheeler, Myron E. Wheeler, and Sarah M. Humphrey, parties of the first part, and the Patterson-Crosby Hardware Company and its assigns, party of the second part, witnesseth: That the parties of the first part agree to sell, assign and transfer to the party of the second part all of their interest in the Humphrey Hardware Company, and all of their interest in the capital stock thereof, for the sum of $10,000, payable as follows: $500 cash in hand, the receipt whereof is hereby acknowledged by the party of the first part; and the balance to be paid upon the delivery by the first parties to the second party of the certificates of stock in the Humphrey Hardware Company owned and held by the first parties, representing two-thirds of the capital stock of the said company, together with the records, papers, notes, books of account, and all other property of the said Humphrey Hardware Company, and possession of the store rooms now used and occupied by the said Humphrey Hardware Company. It is further agreed that the second party shall and it hereby assumes and agrees to pay as a part of the purchase price as above set forth the debts and liabilities of the Humphrey Hardware Company in any amount up to $8,000; but in no case shall the second party be held liable for the debts of the said Humphrey Hardware Company in any amount which such debts shall exceed the sum of $8,000. It is further agreed that the parties of the first part shall secure for and execute to the parties of the second part a written lease for the period of ten years from this date for the property now occupied by the Humphrey Hardware Company, to wit: Lots eleven (11) and twelve (12), block forty-four (44), in the city of Lincoln, Lancaster county, Nebraska, at the annual rental of $2,500, payable monthly in advance. It is further agreed that the action now pending, wherein Cora H. Wheeler is plaintiff and the Humphrey Hardware Company is defendant, and the action now pending, wherein Julia H. Herrick is plaintiff and the Humphrey Hardware Company is defendant, are each fully settled, and

the causes of action in said actions in favor of either party are fully settled, and said actions shall be dismissed at once, and all claims and causes or actions in favor of any owner of the property and stock of the Humphrey Hardware Company against any other owner are hereby satisfied, settled and discharged."

"Lincoln, Neb., Sept. 20, 1905. All under $8,000 indebtedness owing by the stock transferred by Mrs. Sarah M. Humphrey and Cora H. Wheeler shall be paid by the purchaser to Myron E. Wheeler, representative of the two-thirds interest transferred by him as such representative of Sarah M. Humphrey and Cora H. Wheeler. Check for full amount for stock as heretofore agreed upon shall be paid to said Wheeler at time of transfer of stock. Accepted. Patterson-Crosby Hdw. Co."

It is conceded that the consideration was $18,000, instead of $10,000, as stated in the contract. On the 22d day of September the officers of the Humphrey company resigned, and the capital stock owned by Mrs. Humphrey and the Wheelers was assigned to the Patterson company, which then took possession of all of the assets of the Humphrey company. Eight thousand dollars of the consideration were retained by the Patterson company for the payment of obligations of the Humphrey company. It was arranged that the bills were to be "O. K'd" by Wheeler before being paid. About the 27th of September the Nebraska Hardware Company, hereafter called the Nebraska company, was organized and succeeded to and took over all the business and assets of the Patterson company, including the business and assets it had acquired from the Humphrey company. The Patterson company and its successor, the Nebraska company, paid something like $5,000 of the obligations of the Humphrey company, when it was discovered that the liabilities of the Humphrey company were considerably in excess of $8,000. Thereupon, the Nebraska company refused to make further payments of the liabilities of the Humphrey company, and brought this action against the Humphrey

Hardware Company, the Patterson-Crosby Hardware Company, Mrs. Humphrey, the Wheelers, and the unpaid creditors of the Humphrey company. Plaintiff in its petition set out the making of the original contract prepared by Jakway, alleged that it had paid certain obligations of the Humphrey company, and that the remainder of the $8,000 was insufficient to discharge the obligations of the Humphrey company, and asked for a reformation of the contract, praying that the unpaid balance of the $8,000 be ratably distributed to the unpaid creditors of the Humphrey company, and that the plaintiff and the Patterson company be relieved and discharged from any further liability to any of the parties to the action. Mrs. Humphrey and the Wheelers answered, admitting the making of the original contract, and setting up the supplemental and additional agreement, and asked to have the two instruments interpreted by the court so as to hold them liable for only two-thirds of the debts of the Humphrey company, and if the court did not so interpret it, that the contract be reformed so as to express the meaning contended for by them. Some adjustment was made, whereby the creditors of the Humphrey company were eliminated from the action. Upon the trial the court found the debts existing at the time of the sale from Mrs. Humphrey and the Wheelers to the Patterson company to be $10,729.60. It denied the prayer of both parties for a reformation of the contract, and interpreted the contract to mean that it was a guaranty that the indebtedness of the Humphrey company did not exceed $8,000, and that Mrs. Humphrey and the Wheelers were liable for two-thirds of the debts up to $8,000, and for all in excess thereof, and entered a decree in favor of the Patterson company and the plaintiff Nebraska company against Mrs. Humphrey and the Wheelers for the sum of $62.94. The Nebraska company and the Patterson company have appealed.

The precise question for determination is: Does the contract require Mrs. Humphrey and the Wheelers to pay

all the debts of the Humphrey company existing at the time of the transaction, or does it require the Patterson company, as between the parties, to pay one-third of all the debts of the Humphrey company to the amount of $8,000?

"In interpreting a writing, the court, in order to determine its meaning, will consider all the facts and circumstances attending its execution. Among the circumstances so considered are the relations of the parties, the nature and situation of the subject matter, and the apparent purpose of making the instrument or contract in question. * * * It is but another statement of the same rule to say, as is frequently done, that the court will, if necessary, put itself in the place of the parties and read the instrument in the light of the circumstances surrounding them at the time it was made and of the objects which they evidently had in view." 17 Am. & Eng. Ency. Law, 21-23. Substantially the same rule has been adopted by this court in *Tootle & Maule v. Elgutter,* 14 Neb. 158, and by the supreme court of the United States in *Merriam v. United States,* 107 U. S. 441, and in *Nash v. Towne,* 5 Wall. (U. S.) 689. Giving effect to this rule, it is proper to ascertain, if possible, what relationship existed between the Patterson company and Mrs. Humphrey and the Wheelers at the time of their dealings; in other words, did they deal upon the theory and understanding that the Patterson company was the owner of a one-third interest in the Humphrey company?

The record discloses that Wheeler would not deal with Jakway, as the representative of the Patterson company, until it had acquired the interests of the Herricks. Thereupon, an option was secured upon the Herrick interests. The option contract contained the following language: "We (the Herricks) will for five thousand eight hundred seventy-five dollars ($5,875) paid in cash on or before 12 o'clock, noon, of September 30, 1905, assign to said W. E. Jakway all our interest in the suit of Julia H. Herrick against the Humphrey Hardware Company, now

pending in the district court for Lancaster county, Nebraska, and we will pay all the unpaid costs in said suit, and we will further assign to said W. E. Jakway the certificate representing ten thousand dollars ($10,000) face value of the capital stock of said Humphrey Hardware Company, as a part of the consideration for said sale." It thus appears that Jakway, acting for the Patterson company, was to become the owner of the capital stock held by the Herricks. After this option had been obtained, and before the contract was made with Mrs. Humphrey and the Wheelers, Jakway, or his attorney in Jakway's presence, stated that Jakway was the owner of a one-third interest in the bills receivable of the Humphrey company, including the bank account. Also, prior to the making of the contract, Jakway made a written proposition, which contained the following language: "Our offer is $10,000 for the capital stock of Hump. Hdw. Co. you hold or ⅔ int." Mr. Jakway had taken an assignment of all of the Herrick stock, including the one share of Mr. Herrick's stock, which was not in litigation, and, while he claims that he simply took an assignment of Mrs. Herrick's action for conversion against the Humphrey company, it is evident that he did not treat with Wheeler on the theory that he had a claim against the Humphrey company which should be liquidated, but rather on the theory that he was the owner of one-third of the capital stock. The consideration to Mrs. Humphrey and the Wheelers was not to be paid until the capital stock owned by them was assigned to the Patterson company. It thus appears plain that the two parties dealt with each other upon the theory and understanding that the Patterson company was the owner of a one-third interest, and Mrs. Humphrey and the Wheelers were the owners of the other two-thirds interest, in the Humphrey company. It would be somewhat out of the ordinary for one who held a one-third interest in a corporation to claim to buy the whole of the assets from the other stockholders, who owned but two-thirds of the assets. If the Patterson company was

only buying the stock of merchandise, it would be very strange that it should buy the bank account; in other words, buy money. This is not the usual course of dealing, and we cannot account for the transfer of the bank account belonging to the Humphrey company, except upon the theory that the Patterson company had become the owner of the capital stock of the Humphrey company, and thereby the owner of all its assets, including the bank account. Again, if the Patterson company was buying only the stock of merchandise of the Humphrey company, it would not be concerned about the payment of the Humphrey company's debts, and it would not be likely to burden itself with the duty of looking after and adjusting the obligations of another corporation, which required a third party to "O. K." the bills. The only rational theory upon which it would do this is that it was for its own protection, and it would require protection only upon the theory that it had become the owner of the capital stock of the Humphrey company, and thereby liable for its debts. The conclusion, to our minds, is irresistible that in the transaction the Patterson company was simply buying two-thirds of the capital stock from Mrs. Humphrey and the Wheelers.

Accepting this conclusion, it would follow that Mrs. Humphrey and the Wheelers, in transferring a two-thirds interest in the capital stock, would naturally provide for the liquidation of two-thirds of the obligations of the company. If the Humphrey company was to be wound up and to go out of business, its assets would be required, first, for the payment of its debts; the remaining sum to be ratably distributed among the shareholders. The effect would be practically to charge each shareholder with his proportion of the obligations. This would mean that Mrs. Humphrey and the Wheelers would practically be liable for two-thirds, and the Patterson company for one-third, of the debts of the Humphrey company. It would be a very unusual thing for one joint owner by a contract to

consent to pay all of the obligations of the several joint owners.

With these observations in view, let us approach the written contract. And, first, what effect shall be given to the supplemental memorandum dated September 20, 1905? The trial court treated it as a part of the original contract, and construed the two together as constituting the entire contract. We think it is a general rule that, when two or more written instruments have been signed at practically the same time, relating to the same subject matter and the same transaction, that they should be construed together as constituting a single writing. In this case, Wheeler would not assent to the first contract until the Patterson company accepted the supplemental memorandum. When the Patterson company accepted the supplemental memorandum, then Wheeler assented to the original contract. The minds met. The two instruments constituted the contract. The record shows that Wheeler and one other witness testified that Jakway was specifically informed that the $8,000 to be retained was for the payment of two-thirds of the liabilities of the Humphrey company. This, however, is denied by Jakway. There is also evidence tending to show that Jakway ascertained, prior to the making of the contract, that the liabilities of the Humphrey company considerably exceeded $8,000. The instrument dated September 19 is silent as to whether or not the $8,000 was for the payment of all the debts of the Humphrey company, or only two-thirds of them. But the supplemental portion of the contract, dated September 20, providing that "all under $8,000 indebtedness *owing by the stock transferred* by Mrs. Sarah M. Humphrey and Cora H. Wheeler shall be paid by the purchaser to Myron E. Wheeler, representative of the two-thirds interest," cannot be given any effect at all, and would be entirely devoid of any meaning, it appears to us, unless it be interpreted to mean that the $8,000, or so much of it as was necessary, should be used to discharge two-thirds of the liabilities of the Humphrey company.

The trial court held that the original contract was a guaranty that the indebtedness of the Humphrey company did not exceed $8,000, and held that the Patterson company was liable for only one-third of the debts up to the limit of $8,000, or that it was liable only for $2,666.66. Whether or not this holding is right it is not necessary to consider, because it was beneficial, instead of prejudicial, to the appellants, and they cannot therefore complain of it.

Appellant complains in its petition and cross-petition that Mrs. Humphrey and Mr. Wheeler fraudulently procured payment of claims against the Humphrey company in their favor to the amount of $900, and asked to have this amount charged to them. The evidence indicates quite clearly to us that these claims were proper and legitimate claims against the Humphrey company. And, even if they were fraudulently paid, that would not be material in this case, because the Patterson company is held liable for only one-third of the debts up to $8,000, and it is conceded that the debts existing against the Humphrey company, exclusive of the claims of Mrs. Humphrey and Mr. Wheeler, are in excess of $8,000, and therefore the payment of these claims added no burden to the Patterson company.

Mrs. Humphrey and the Wheelers attempted to perfect a cross-appeal, but their cross-appeal was, on motion of the plaintiff, stricken from the files. They now ask leave to reinstate their cross-appeal. The record shows that Mrs. Humphrey and the Wheelers did not file any cross-assignment of errors or any brief of errors until more than 13 months after the judgment was entered in the district court, and more than 8 months after the transcript was filed in this court. Rule 35 of this court provides: "Coparties of appellants may join in the appeal or take cross-appeal, or other appellees may take cross-appeal by filing with the clerk of this court a typewritten or printed brief which shall contain only the errors complained of, the court from which the appeal is taken, the

date of the judgment appealed from, and the names of the parties plaintiff and defendant, respectively. Such brief must be filed within 30 days after service of notice of appeal upon them, or within the same time after having waived such service, or within the time limited by statute for appealing." The typewritten or printed brief, which shall contain only the errors complained of, was not filed within 30 days after the service of notice of appeal upon Mrs. Humphrey and the Wheelers, nor within the time limited by statute for appealing. The failure of Mrs. Humphrey and the Wheelers to comply with the provisions of the statute and the rules of the court deprives them of the right to now perfect their cross-appeal, and the motion to reinstate the cross-appeal should be overruled.

We therefore recommend that the motion to reinstate the cross-appeal be overruled, and that the judgment of the district court be affirmed.

DUFFIE, C., concurs.

By the Court: For the reasons given in the foregoing opinion, the motion to reinstate the cross-appeal is overruled, and the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MERCHANTS BANK (S. A. D. SHILLING, RECEIVER), APPELLANT.*

FILED MAY 21, 1908. No. 15,119.

1. **Evidence:** ADMISSIONS OF COCONSPIRATORS. Admissions made out of court by a conspirator after the complete execution of the conspiracy are not admissible in evidence in an action against his coconspirator for the purpose of establishing conspiracy.

2. **Conspiracy:** EVIDENCE. A conspiracy cannot be established by the admissions alone of a coconspirator who is not a party to the record.

* Rehearing allowed. See opinion, p. 710, *post.*

3. **Evidence:** ADMISSIONS OF COCONSPIRATORS. Admissions of a conspirator are not admissible in evidence in an action against his coconspirator, unless there is other evidence tending to prove conspiracy.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

Field, Ricketts & Ricketts, for appellant.

B. F. Johnson, contra.

GOOD, C,

In 1897, in the district court for Lancaster county, the Merchants Bank was adjudged insolvent, and S. A. D. Shilling was appointed receiver to wind up its business. In this case the Chicago Cottage Organ Company, Kate C. Zehrung, and A. J. Campbell intervened and procured the allowance of preferred claims in their favor and against the said bank, aggregating $1,868, with interest from the date of their allowance at 7 per cent. In 1901, and during the pendency of the receivership proceedings, these parties sold and assigned their preferred claims to W. W. Towle for sums aggregating about $130. Later Towle transferred these claims to Shilling. In October, 1903, Shilling, as receiver, filed his final report, which was approved by the court. Distribution was ordered and made, and the receiver discharged. There were sufficient funds in his hands to pay all preferred claims in full, and Shilling realized upon the three claims transferred to him about $2,700. In April, 1906, the three preferred creditors mentioned filed in the district court for Lancaster county a petition entitled as follows:

"Petition in Equity. State of Nebraska v. Merchants Bank (S. A. D. Shilling, Receiver). Petition of intervening creditors, Chicago Cottage Organ Co., Kate C. Zehrung, and A. J. Campbell, and preferred creditors of Merchants Bank, to vacate final order of court, and all

other orders of court, and vacate order discharging receiver."

In this petition they alleged the appointment of Shilling as receiver, the amount and date of allowance of each of their preferred claims, and charged a conspiracy between Shilling and said Towle to cheat, swindle and defraud the petitioners out of their preferred claims, and alleged that pursuant to this purpose the said Shilling had fraudulently misrepresented the amount of the assets in his hands as receiver, and had represented their claims to be worthless, and that they believed and relied upon these misrepresentations so made in selling and transferring their claims to said Towle. It was also charged that Shilling furnished the money which Towle paid them for their claims. They prayed for the annulment and setting aside of the order of the court approving the final report of the receiver and ordering the discharge of the receiver, and the order directing the distribution of the funds in his hands, and asked for an accounting of the money received by the receiver, and that he be required to pay their said preferred claims in full with interest. A general demurrer to this petition was overruled, and the receiver answered, admitting certain formal allegations in the petition, pleading the statute of limitations, and denying all the other allegations of the petition. Upon a trial the district court found all the issues in favor of the petitioners and against the receiver, set aside the former orders of the court confirming the final report of the receiver and ordering a distribution of the funds and the discharge of the receiver, and ordered the receiver to pay the several preferred claims of the petitioners, but refused them interest from the time of the first order of distribution in 1903. Both parties have appealed.

The defendant contends that the petition is based upon section 602 of the code, and particularly upon the fourth subdivision thereof, which, so far as it is applicable, is as follows: "A district court shall have power to vacate or

modify its own judgments or orders after the term at which such judgment or order was made. * * * Fourth. For fraud practiced by the successful party in obtaining the judgment or order." Section 603 provides that the proceedings to vacate or modify a judgment or order on the grounds mentioned in the fourth subdivision shall be by petition. Section 609 of the code provides that proceedings to vacate or modify a judgment or order for the causes mentioned in subdivision 4 of section 602 must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant or a person of unsound mind, and then within two years after the removal of the disability. The petition in this case was filed more than two years after the making and entering of the judgment and the orders sought to be set aside. If, therefore, the petition is brought under section 602 of the code, it is clear that it was filed too late to be of any avail, and that the statute of limitations is a complete defense.

Upon the other hand, plaintiffs contend that their petition is not based upon subdivision 4 of section 602 of the code, but is an original action in equity. Bearing in mind the title to the petition above quoted and the form of the prayer, which asks for the annulment of the judgment and certain orders of the court rendered herein, it would indicate that the appellees had originally intended to proceed under the fourth subdivision of section 602. It does not appear to be material, however, whether plaintiffs originally intended to proceed under section 602 of the code. The petition seems to be sufficient for an original action in equity, and we shall treat it as if it had been so originally intended.

The defendant urges that the action is barred by the statute of limitations, even if it be treated as an original action in equity. It is somewhat doubtful whether the statute of limitations can be urged as a defense by a receiver in an action against him for fraud and conspiracy, if there is sufficient evidence to sustain such a charge.

But whether or not the statute of limitations is available as a defense in this case we do not at this time decide, as the judgment must be reversed for other reasons.

It will be observed that Towle, to whom the assignments were made, is not a party to this proceeding. The case proceeds upon the theory of a conspiracy between Towle and Shilling. The only evidence of any conspiracy is contained in the testimony of two or more witnesses who testify as to admissions made by Towle. The testimony of one Adams contains the principal evidence upon this branch of the case. His testimony is as to conversations had with Towle long after the rendition of the judgment and the distribution of the funds. It is evident that, if any conspiracy existed, the statements of Towle were made long subsequent to it and long after it had been carried out. Under such circumstances, the evidence as to admissions made by Towle was not admissible to prove the fact of conspiracy. The rule applicable to this evidence is laid down in 3 Greenleaf, Evidence (16th ed.), sec. 94, as follows: "The *principle* on which the *acts and declarations of other conspirators,* and acts done at different times, are admitted in evidence against the persons prosecuted is that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by any one in furtherance of that design a part of the *res gestæ* and therefore the act of all. It is the same principle of identity with each other that governs in regard to the acts and admissions of agents when offered in evidence against their principals, and of partners, as against the partnership, which has already been considered. And here, also, as in those cases, the evidence of what was said and done by the other conspirators must be limited to their acts and declarations made and done while the conspiracy was pending, and in furtherance of the design; what was said or done by them before or afterwards not being

within the principle of admissibility." In *Farley v. Peebles,* 50 Neb. 723, it is said: "What is merely narrative of a past occurrence, or what is merely expressive of a future purpose, would not generally be so admissible; but an act performed, a declaration made, a writing made or delivered, as a part of the matter in dispute, that is, in itself tending to advance the common purpose or object of the alleged conspiracy, is neither hearsay nor merely the admission of one of the parties. It is an overt act in pursuance of the object. From such overt acts of each of the alleged conspirators the jury may, together with other evidence, infer the existence of the conspiracy itself. We are aware that it is the established rule that the acts or declarations of one of the alleged conspirators are not admissible as against the others unless the conspiracy itself be established, in which case the act or declaration of one becomes that of all; and we are aware, also, that it has sometimes been stated that such acts or declarations are not admissible in evidence until the conspiracy itself is first *prima facie* established." The evidence relating to the alleged admissions of Towle was not admissible, because these admissions were made long subsequent to the complete execution of the conspiracy. Without these admissions there is not sufficient evidence to warrant or sustain a finding of conspiracy.

In view of the conclusions which we have reached, we do not think it would be wise to discuss or express an opinion as to the evidence relating to the transactions between Towle and Shilling and between Towle and the plaintiffs. It may be remarked, however, that it is always a reprehensible practice for a receiver to purchase claims that are to be paid out of funds in his hands. The receiver is an officer of the court, and acts in a trust capacity, and the utmost good faith should be required of him in every transaction. The presumption is against any transaction where he purchases outstanding claims from which he reaps a personal profit. The same should

be closely scrutinized, and the good faith of the transaction clearly shown.

The cross-appeal of the plaintiffs was based upon the alleged error of the trial court in refusing to allow any interest upon the claims of the plaintiffs. In view of the conclusion that we have reached that the evidence is insufficient to support the judgment in favor of the plaintiff for the principal of their claims, it is not necessary to discuss the question raised by the cross-appeal.

Because there is not sufficient competent evidence in the record to sustain the findings of conspiracy, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

The following opinion on rehearing was filed February 20, 1909. *Former judgment vacated, cross-appeal dismissed, and judgment of district court reversed, except as to Chicago Cottage Organ Company:*

1. **Receivers:** ACTION FOR DECEIT. A receiver of a defunct bank wrote to a preferred creditor making positive erroneous statements as to the condition of the estate, at a time when an employee was negotiating for the purchase of the preferred claim, at a nominal sum, which purchase was afterwards perfected, the creditor in making the sale relying upon the representations made by the receiver. The claim was afterwards assigned to the receiver, who attempted to conceal the fact that he had an interest therein. The receiver afterwards realized sufficient funds to pay the claims in full. *Held*, Sufficient to permit the creditor to recover from the receiver on the ground of deceit.

2. **Fraud:** PLEADING: LIMITATIONS. After the discharge of a receiver a preferred creditor brought suit, alleging facts sufficient to permit him to recover from the receiver for fraud in procuring

an assignment of the creditor's claim. *Held*, That such action is not controlled by sections 602 and 609 of the code, relating to the manner and time for the vacation or modification of judgments in the court in which they were obtained.

3. Joint assignments of error not good as to all parties who join therein must be overruled.

EPPERSON, C.

The former opinion in this case is published, *ante*, p. 704, to which reference is made for a statement of the facts involved. In our former opinion we said: "The only evidence of any conspiracy is contained in the testimony of two or more witnesses who testified as to admissions made by Towle." Towle was not made a party to the proceeding, but was alleged to have been the receiver's coconspirator in defrauding plaintiffs in the purchase of their preferred claims. As to one of the plaintiffs the author is convinced that the statement above quoted is erroneous. The evidence shows that on April 27, 1901, at which time Towle was negotiating for the purchase of the claim, the receiver wrote to the Cottage Organ Company, one of the interested creditors, in reply to an inquiry stating: "I have realized $2,700, and in the suit against stockholders it has developed that $2,500 of the capital stock is all that is solvent, the remainder having failed and gone through bankruptcy. You will, therefore, see $5,200 is the *total possible* receipts to pay holders of claims, attorney's fees, expenses and receiver's fees. Therefore I do not think holders of claims will ever receive a dollar." On the date of the above letter the receiver had in fact realized $3,969.82, and the statement as to the total possible receipts was erroneous to the extent of $1,111.25. It will be noted that there is nothing in the above quoted letter to indicate that the statements there made were mere predictions, yet we find that on May 27, 1902, the receiver wrote the Organ Company another letter, in which he refers to the statements in his former letter as predictions, giving as his excuse therefor

that he was not allowed as receiver the salary he was assured he would receive. The court had in December, 1900, fixed the salary of the receiver at $50 a month, with a maximum allowance of $2,500. Although there is evidence in the record showing that, in a conversation between the judge of the court in which the receivership matter was pending and the receiver, the judge told him that he would be allowed a greater compensation than had been theretofore fixed. Yet we cannot believe that the receiver was justified at any time in concluding that the court would allow him all of the money realized over and above the expenses as his compensation. His statements were false, and were relied upon by the Organ Company. During the time of the negotiations for these claims Towle was in the receiver's employ assisting in the collection of the assets of the defunct bank. When the receiver obtained the claims from Towle, he caused them to be assigned to a third party. Ink marks were afterwards drawn through these assignments, and vouchers for the payment of the claims were signed by Towle. The receiver took title to the claims from Towle, claiming that they were assigned to him in consideration of certain indebtedness owing by Towle. This indebtedness amounted to between $500 and $600. The amount realized on the claims here involved was about $1,830. We have no reason to doubt that the receiver held this indebtedness against Towle and that it was settled as testified to, but this adds no virtue to the transaction which resulted in the purchase of the claims by Towle. Were we to give this fact significance, it would be to consider Towle's indebtedness to the receiver in the light of an inducement or a motive prompting the receiver to assist Towle in deceiving the creditor. The receiver may possibly have contemplated that the court would allow him a greater compensation sufficient to absorb the assets of the estate; but he had no right to conclude that such would be the case, and, resting upon such conclusion, make positive statements to creditors to their prejudice. There is no

evidence in the record that the creditors other than the Organ Company parted with their claims through any representations made by either Shilling or Towle. Towle proposed to purchase, and they accepted his proposition upon the advice of their respective attorneys, who acted upon their own judgments, uninfluenced by either of the alleged conspirators, and, in so far as their interests are concerned, the judgment of the district court must be reversed.

The assignment was made by the Organ Company to Towle in 1901. The receiver obtained his final discharge October 29, 1903. This action was instituted April 6, 1906, and it is strenuously urged by the appellant that the creditors were proceeding under subdivision 4, sec. 602 of the code, and, therefore, not having instituted the suit within two years from the discharge of the receiver, the proceeding was barred by section 609 of the code. We are convinced that sections 602 and 609 do not apply, except for cases of fraud in obtaining an order or judgment to which the successful party was not entitled. An action based upon fraud may be instituted within four years from the time the fraud was committed or from the time of its discovery. There is nothing in this case showing that any fraud was committed upon the court, or any deceit resorted to in procuring the order discharging the receiver. It is true that in their petition the creditors, after alleging the commission of the fraud in procuring the assignments of their claims, prayed, among other things, that the court set aside the final judgment rendered in the receivership proceedings and vacate the order discharging the receiver. But, in addition thereto, they prayed for an accounting of moneys received by the receiver and for judgment. The creditors did not need to set aside the discharge of the receiver, nor to open up the former proceedings, but could have proceeded against the receiver personally to recover damages for the wrong done. We consider it immaterial that they should ask a vacation of the order of discharge. It was unnecessary

that they sought to make this proceeding supplemental to, and as a part of, the case pertaining to the receivership, inasmuch as they stated a cause of action in equity against the receiver. In *Jennings v. Simpson,* 12 Neb. 558, it is said: "A court of equity possesses the power to make all necessary orders for the control of receivers, referees and commissioners appointed by it, and such power is not limited by the provisions of sec. 602 *et seq.* of the code." Whatever might have been the intention of the creditors with reference to section 602 of the code, they alleged a cause of action sufficient to entitle them to recover against the receiver.

But it is argued that in any event the action is barred by the statute of limitations. The petition alleged that the fraud complained of was not discovered until within a few months prior to its filing. This was a sufficient statement showing that the petition was filed within the time limited. The only plea of the statute of limitations interposed by the receiver in his answer is as follows: "That more than two years have intervened between the time of said discharge and the filing of the petition herein to open said judgment, and the right to open or modify said judgment is barred by the statute of limitations." This is an insufficient plea of the statute of limitations, and would be available only in the event that we should consider that the proceeding instituted by the creditors was brought under the provisions of section 602 of the code.

All the creditors bringing the action joined as cross-appellants in filing assignments of error in this court. Their principal complaint is that the court failed to allow them interest upon their various claims against the receiver. As we view it the Organ Company was entitled to recover the amount of its claim against the receiver, and should have been awarded interest. But, as the other creditors failed to prove that they were entitled to recover, the judgment of the lower court denying them interest was without prejudice; and, as the Organ Company

joined with them in filing assignments of error, the cross-appeal must be dismissed. It is the rule in this court that joint assignments of error which are not good as to all persons who join must be overruled. *Levy v. South Omaha Savings Bank,* 57 Neb. 312, and cases there cited.

We therefore recommend that our former opinion be vacated; that the cross-appeal of the creditors be dismissed; and that the judgment of the lower court in favor of the Chicago Cottage Organ Company be affirmed, but reversed and remanded for further proceedings as to Kate C. Zehrung and A. J. Campbell.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the former opinion is vacated, the cross-appeal is dismissed, and the judgment of the lower court in favor of Kate C. Zehrung and A. J. Campbell is reversed and remanded for further proceedings, but affirmed as to the Chicago Cottage Organ Company.

JUDGMENT ACCORDINGLY.

CLYDE C. CARLILE, APPELLEE, V. REUBEN J. BENTLEY, APPELLANT.

FILED MAY 21, 1908. No. 15,160.

1. **Appeal:** PLEADING: SUFFICIENCY. Where a pleading has been attacked for the first time in the appellate court, and a strict grammatical construction thereof would be contrary to the plain and obvious intent of the pleader, and would substantially defeat the action, the pleading should be liberally construed so as to give effect to the intent and purpose of the pleader.

2. **Pleading:** CONSTRUCTION: DAMAGES. In an action to recover for personal injuries, where facts have been alleged which would show several elements of damages, the last one being for $25 incurred for medical attendance, which is immediately followed by

an averment that plaintiff was thereby damaged in the sum of $2,043; such allegation construed, and *held* that it was the intent of the pleader to charge that the amount of damages was the result of the several elements of damages alleged, and that the petition should not be construed so as to limit the recovery to the item of medical attendance.

3. **Trial:** DAMAGES: INSTRUCTIONS. In an action for personal injuries, it is error to submit to the jury the question of damages for loss of time, when there is no evidence of the value of the time lost. The value of such lost time must be proved by what wages the plaintiff usually and ordinarily received, and not by what he received in an isolated instance.

4. ———: WITHDRAWAL OF DEFENSE FROM JURY. It is proper for the trial court to withdraw from the consideration of the jury any affirmative defense pleaded that is not sustained by any evidence.

5. **Damages:** EVIDENCE. In an action for personal injuries, it is not proper for the plaintiff to prove the number and ages of children that he has dependent upon him for support.

6. **Appeal:** EXCLUSION OF EVIDENCE. Error of the trial court in excluding evidence cannot be successfully urged in the appellate court, where no offer of proof was made after the sustaining of the objections to the questions.

7. ———: EVIDENCE: REVIEW. Where evidence that is not properly admissible has been received in evidence over objections to a question, but where there is nothing in the form of the question to indicate that the evidence would be inadmissible, the aggrieved party cannot complain, unless he moves to strike out and withdraw from the consideration of the jury the objectionable testimony.

8. **Damages:** EVIDENCE. In an action for personal injuries, it is improper to permit a medical witness to testify that such an injury as that complained of might become a permanent injury. The inquiry should be confined to the reasonably probable effects of the injury complained of.

9. **Action for Damages:** ASSAULT AND BATTERY: INSTRUCTIONS. In an action for damages resulting from an assault and battery inflicted upon the plaintiff by the defendant, it is not proper to instruct the jury that a crime has been committed, and to define the crime of assault and battery.

APPEAL from the district court for Franklin county: ED L. ADAMS, JUDGE. *Reversed.*

Dorsey & McGrew, for appellant.

George W. Prather, contra.

GOOD, C.

This action was brought by plaintiff to recover damages resulting from an assault and battery inflicted upon him by defendant, and for expenses incurred for surgical and medical attendance in treating his wounds. The defense tendered in the answer was, first, a general denial; second, that at the time of the injury complained of the defendant was threatened and assaulted by the plaintiff, who, it is alleged, was a trespasser upon the premises of the defendant, and was resisting the defendant in the lawful exercise of his authority thereon, and that the defendant used no more force than was necessary to repel the attacks of the plaintiff and remove him from the premises of the defendant, and to defend and protect the person and property of the defendant. The reply was a general denial. The plaintiff had judgment, and the defendant appealed.

From the record it appears that the defendant was the owner of a hotel property in Bloomington, Nebraska, and that in September, 1905, he entered into a written contract with the plaintiff, which provided that the plaintiff should operate, conduct and manage the hotel for the defendant; that plaintiff should employ all necessary help, and provide everything necessary for the running of the hotel, except the furniture; that he should collect all that was due from the guests of the hotel, and should pay over to the defendant the sum of $7 a week, and that plaintiff should retain all the remainder of the income of the hotel for his services. It was further stipulated that the defendant should have full and complete possession of the hotel and all the furniture therein, and that plaintiff should not claim any right or interest in the hotel property as tenant, leaseholder, or otherwise. The contract

also provided that it might be terminated by either party upon one day's written notice to the other party. On Saturday night, the 7th of October, 1905, defendant served a written notice upon the plaintiff to the effect that he would terminate the contract in 24 hours. On Monday morning following he demanded possession of the premises, and a controversy ensued in the dining room of the hotel. There was a dispute as to whether plaintiff would surrender possession at once, and there was a personal encounter, in which no one seems to have been injured. Defendant left the hotel with the avowed purpose of having the plaintiff and his family arrested. A few minutes later he returned, and the parties to the action met in the office of the hotel. It appears that other members of plaintiff's family were making some demonstration toward the defendant, and there is a dispute in the testimony as to whether plaintiff was about to assault the defendant with his fists. It appears that bystanders interfered, and that defendant struck the plaintiff on the head with a heavy iron poker and felled him to the floor. This appears to have been the only blow that was struck in the second controversy. The result of the blow on plaintiff's head was to inflict a wound about four inches long, which cut through the scalp and periosteum, and produced some depression in the skull. The evidence tends to show that plaintiff was a reasonably vigorous and robust man, about 56 years of age, and that he had no business or profession other than that of a common laborer, except during the time that he operated the hotel. It appears that he was unable to perform any labor of any consequence for a period of about three months after the injury, and that for a long time thereafter he was nervous, unable to sleep well, suffered from severe headaches, and was unable to perform labor that required stooping or bending over, without causing him great pain in the head. The jury awarded damages in the sum of $725.

The first assignment of error relates to the sufficiency of the petition to recover for any element of damages

other than the sum paid for medical attendance. That part of the petition relating to the injury and damages sustained is as follows: "That on the 9th day of October, 1905, the defendant unlawfully made an assault upon the plaintiff, and him, the said plaintiff, did then and there beat, wound, and illtreat by striking plaintiff on the head with a heavy iron stove poker, whereby a deep and dangerous incision about 3½ inches in length was cut in the plaintiff's head, inflicting such a shock upon plaintiff, and so bruising, wounding and injuring him, that ever since said injury, to wit, for the last three months, plaintiff has been unable to attend to his business, and has ever since said injury and by reason of the same suffered great pain of body and mind, and said injuries are of a permanent nature; second, that plaintiff was compelled to expend for the services of a physician and surgeon in dressing and caring for said wound the sum of $25, to plaintiff's damage in the sum of $2043."

Defendant contends that the petition does not allege that the plaintiff sustained any damages other than that occasioned by the payment of the bill for medical attendance in the sum of $25. With this view we cannot concur. The petition is not artistically drawn, and, if a strict grammatical construction were given to it, there might be some merit in this contention. But, taking the petition as a whole, we think it is apparent that the pleader intended to aver that he had sustained damages in the sum of $2,043, not by reason of expense for medical attendance alone, but on account of all the facts alleged in the petition, including the bill for medical services. To follow the contention of the defendant, and to hold that the petition alleged that the plaintiff was damaged in the sum of $2,043 by reason of the payment of the sum of $25, and to hold that the allegation of damages had no relation to the other part of the petition, would be to follow the strict letter, and disregard the substance and plain intent of the pleader. The petition is far from being a model of excellence, but to our minds it is sufficient to

show that it was the intent and purpose of the pleader to allege that the damages sustained were occasioned by reason of the assault and injury inflicted, and included pain, suffering, loss of time, etc., as well as the payment of $25 for medical attendance. Prior to the filing of the answer the defendant filed a motion to require the plaintiff to make his petition more definite and certain, by setting out in what respect plaintiff's alleged injuries were permanent in their nature, the kind of business the plaintiff was engaged in, the earnings or profits plaintiff was accustomed to derive from his business, and the amount of damages which he claims to have suffered from being unable to attend to his business. This motion was overruled. Defendant insists that this motion was sufficient to challenge the sufficiency of the petition to the defect now complained of, but it appears to us rather that the motion was intended to require the plaintiff to specify the nature and extent of his injuries, and to itemize his elements of damages, and that it would not reach the defect now complained of. The rule is that, where a pleading is attacked for the first time in the appellate court, it will be construed liberally in favor of the pleader. We think the trial court properly refused to limit the recovery to the one element of damages for medical attendance.

Defendant complains because the court submitted to the jury as an element of damages loss of earnings in plaintiff's business, upon the grounds that the petition was insufficient to entitle the plaintiff to recover for such element of damages. The theory of this contention is that loss of time or loss of earnings is special damages and must be specially pleaded. It will be conceded that special damages cannot be recovered unless specially pleaded, but we do not think that the loss of time or the loss of earning capacity can be said in this case to come under the head of special damages. Where special damages are claimed for a personal injury, the only difficulty lies in the proper application of the rule that all of the

results of the act or injury complained of need not be set forth in detail to be admissible, so long as such results are necessarily or legally implied from the injury alleged; while the effects that are not the natural and necessary results of the injury complained of constitute special damages and must be specially pleaded. 13 Cyc. 185. Where the injury alleged will necessarily render the person less capable of performing his usual business duties, proof of the impairment of his general earning capacity may ordinarily be given under the general allegations of the injury and damages resulting therefrom, such as the inability to attend to his ordinary business, without any special averment as to the nature of the plaintiff's occupation or employment. And loss of time and of earning capacity may be proved without a special allegation, if the injury suffered would necessarily import a loss of time. 13 Cyc. 187, 188. We think the injury complained of here was such as to necessarily import a loss of time, and the allegation in the petition was for a loss of three months' time, so that the allegations of the petition were sufficient in this respect.

Defendant also complains because the court submitted to the jury the element of the loss of time, upon the ground that there was no proof in the record as to the value of the plaintiff's time. There appears to be merit in this complaint. The record discloses that, generally speaking, the plaintiff had been a common laborer; but there was no proof as to the value of his time, except that for a short period he had worked for a bridge company at 25 cents an hour. The value of one's time lost cannot be proved by evidence of wages that one had received upon some special occasion. There is no proof in the record that the plaintiff could or would have earned anything during the three months that he is alleged to have been incapacitated. Under these circumstances, there was nothing by which the jury could measure or determine the value of the time alleged to have been lost by reason of the.

injury. Before plaintiff can recover for time lost it must be shown that he was deprived of something of value, and the value of that something must be shown. It must not be left to the jury to infer or determine from speculation. If plaintiff sustained any loss in this particular, it was capable of proof, and, in the absence of this proof, it was improper to submit this element of damages to the jury for its consideration.

Complaint is made of the sixth instruction given by the court. This instruction was to the effect that the plaintiff was in rightful possession of the hotel property, that the contract between the parties was simply a lease of the premises, that the notice was insufficient to terminate the lease, and that the plaintiff was not a trespasser upon the defendant's premises, and that the defendant would not be justified in using any force whatever in removing the plaintiff from said hotel, and directed the jury to disregard the defense that plaintiff was a trespasser upon the defendant's property, and that defendant used no more force than was necessary to remove him. We think the contract falls far short of being a lease, but whether it amounted to a lease is wholly immaterial in this case. The evidence discloses that the injury complained of was not inflicted in any attempt by the defendant to remove the plaintiff from the hotel. It is clearly shown that the injury was inflicted in anger and as the result of a previous quarrel. It is true that the quarrel arose out of the termination of the contract, but the injuries were not inflicted in the course of any attempt to remove plaintiff from the defendant's premises. It was therefore immaterial whether the contract amounted to a lease, or whether the notice was sufficient to terminate the contract, and it was proper for the court to withdraw this particular defense from the consideration of the jury, because it had no support in the evidence.

Defendant complains because the plaintiff was permitted to prove the number and ages of children he had dependent upon him for support. In an action of this

character the recovery is limited to such damages as the injured party himself has sustained, and any evidence as to the number of his family or the number of children dependent upon him for support is immaterial and foreign to any issue in the case. The tendency of such evidence is to inflame the minds of the jurors and arouse their sympathies, and thus unduly enhance the amount of the recovery. Such evidence was neither relevant nor material, and its admission was prejudicial error. *Pennsylvania Co. v. Roy,* 12 Otto (U. S.), 451; *Kreuziger v. Chicago & N. W. R. Co.,* 73 Wis. 158; *Kansas City, Ft. S. & M. R. Co. v. Eagan,* 64 Kan. 421. Defendant next contends that there was error in refusing to permit him to testify what his motive was in striking the plaintiff. It is not apparent how the motive of defendant could have been material. In any event, no error could be predicated upon this refusal, because no offer of proof was made, and we are unable to say that any evidence that was properly admissible has been excluded.

Complaint is also made of the admission of certain evidence by the witness Dunn, who was permitted to answer the following question: "State whether you had a conversation with Mr. Bentley, in regard to getting Mr. Carlile out of the hotel, on the morning of October 9, 1905, and, if so, state what that conversation was"—to which the defendant objected as immaterial, irrelevant and incompetent. This objection was overruled, and the witness answered that Bentley had said: "That is the cheapest way to get him out." We are unable to say that this evidence was prejudicial, and there was nothing in the question to show that the answer would be immaterial and irrelevant, and no motion was made to strike it out after it was answered. Where a question has been propounded to a witness, and the question does not indicate that the evidence sought to be elicited will be objectionable, it is not error for the court to overrule the objections thereto. If the answer discloses that the evidence is objectionable, the objecting party should then move to

have the evidence stricken out and withdrawn from the consideration of the jury. This the defendant failed to do.

Complaint is made because the trial court permitted Doctor Sumner to answer, over objections, the following question: "Doctor, I will ask you if, in your opinion, that wound was such an injury as a permanent injury might result from? A. Yes; all that class of injuries might make a permanent injury." A similar question was propounded to another medical witness, and a like answer returned. We think the admission of this evidence was erroneous. To recover for any permanent injuries such permanent injuries must be proved. This evidence did not tend to show that plaintiff had sustained any permanent injury or that such result was probable by reason of the wound inflicted. To admit such evidence is to permit the jury to wander into a wide domain of speculation and to found their verdict in part upon remote possibilities. What the result of the injury was, or what in reasonable probability it would be, and not what it possibly might be, was what the jury should have determined.

Complaint is made of the third instruction given by the court on its own motion. It is in the following language: "The basis of plaintiff's claim is founded upon an assault and battery inflicted upon him by the defendant, and you are instructed that an assault and battery is the unlawful striking, beating or wounding another, and it matters not how much force is used in the unlawful act, as the laying on of hands, striking, or beating or wounding another unlawfully would constitute the crime of assault and battery." This instruction defined the crime of assault and battery, and informed the jury that the action was founded upon it. While we are not able to say that this instruction was prejudicial to either party, it was not necessary that the jury should be informed that a crime had been committed, if they found for the plaintiff. The jury were not concerned with whether or

not a crime had been committed, but only with the questions of whether or not the defendant had wrongfully inflicted an injury upon the plaintiff, and the extent of his damages in consequence thereof. It is possible that the jury might be misled by such an instruction, and make the amount of recovery in part a penalty for the crime, while the amount of recovery should be limited strictly to compensatory damages. Upon a retrial this instruction should be modified or entirely omitted.

Because of the prejudicial errors committed by the trial court and herein pointed out, we recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

CHARLES D. CARMICHAEL, APPELLANT, V. JANE MCKAY, APPELLEE.

FILED MAY 21, 1908. No. 15,198.

1. **Justice of the Peace: ABSENCE: CALLING IN ANOTHER JUSTICE.** That part of section 1092 of the code which reads as follows: "In case of the sickness or other disability, or necessary absence of a justice, at the time appointed for trial, another justice of the same county may, at his request, attend in his behalf, and shall thereupon become vested with the powers, for the time being, of the justice before whom the summons was returnable"—construed, and *held* that, so long as the necessary absence of the justice before whom the case was commenced continued, the justice who was requested to attend in his behalf would retain jurisdiction to do and perform every act required in the proceedings, including the filing and approval of an appeal bond and the making of a transcript.

2. Appeal: EXCEPTIONS, BILL OF. This court will not consider any affidavits that may appear in the transcript as having been used upon any contested question of fact determined by the district court, unless such affidavits are preserved in a bill of exceptions.

APPEAL from the district court for Furnas county: ROBERT C. ORR, JUDGE. *Affirmed.*

Perry & Lambe, for appellant.

W. S. Morlan, contra.

GOOD, C.

On December 10, 1906, the appellant commenced this action before L. B. Burton, a justice of the peace of Cambridge precinct, in Furnas county. Summons was issued and made returnable on the 17th of December. Justice Burton, being unable to be present on the day set for trial, pursuant to the provisions of section 1092 of the code, requested G. E. Simon, the other justice of said precinct, to attend and hear the cause. On that day the parties appeared, and trial was had before justice Simon, resulting in judgment in favor of the plaintiff. On the 27th of December the defendant, appellee herein, presented to Justice Simon an appeal bond, which was by him approved and entered upon the docket. Under the date of January 8, 1907, Justice Simon made and certified to a transcript of the proceedings had in the case, which was on the following day filed in the district court for Furnas county. Thereafter the plaintiff appeared specially in the district court, and filed objections to the jurisdiction of that court upon the following grounds: That no undertaking for appeal had been furnished by the defendant; that no undertaking had been approved by Justice Burton, or by any one authorized by him; that Justice Burton had not requested Justice Simon to approve the undertaking for appeal, as required by section 1007 of the code; and that no transcript of the proceedings had been filed by Justice Burton, and that no transcript was on file cer-

tified to by Justice Burton. This special appearance and the objections to the jurisdiction were overruled by the district court on the 11th of March, 1907. Plaintiff elected to stand upon his objections to the jurisdiction, and refused to file a petition in the cause, and on the 16th day of March, upon motion of the defendant, the cause was dismissed. From the order overruling the objections to the jurisdiction of the court and judgment of dismissal, the plaintiff has appealed to this court.

Appellant contends that the cause was pending before Justice Burton; that Justice Burton had returned to Cambridge precinct on the 23d of December, 1906, and prior to the time when the appeal bond was presented to Justice Simon and approved, and prior to the making of the transcript; that, upon the return of Justice Burton, Justice Simon was divested of all power to further act in the cause; and that the approval of the appeal bond by Justice Simon and the transcript made by him did not confer jurisdiction of the cause upon the district court. Section 1092 of the code is in the following language: "In case of the sickness or other disability, or necessary absence of a justice, at the time appointed for trial, another justice of the same county may, at his request, attend in his behalf, and shall thereupon become vested with the powers, for the time being, of the justice before whom the summons was returnable. In that case the proper entry of the proceeding before the attending justice, subscribed by him, must be made in the docket of the justice before whom the writ was returnable. If the case be adjourned, the justice before whom the summons was returnable must resume jurisdiction." Under this section of the statute, so long as the necessary absence of the justice before whom the case was commenced continued, the justice who was requested to attend in his behalf would retain jurisdiction to do and perform every act required in the proceedings, including the filing and approval of the appeal bond and the making of the transcript. The appellant does not contend otherwise. But

appellant does contend that Justice Burton returned on the 23d of December, and because of his return Justice Simon was thereby divested of any power or jurisdiction to proceed in the premises. It will be observed that a question of fact was therefore presented for the determination of the district court; namely, whether Justice Burton had returned to Cambridge precinct prior to the approval of the undertaking for appeal and the making of the transcript. Appellant contends that the record shows these facts by the affidavit of Justice Burton. There is no bill of exceptions, but there is such an affidavit appearing in the transcript. But the record is silent as to whether this affidavit was presented to the district court and considered by it in the determination of the question of fact. It is silent, also, as to what, if any, other evidence was presented to the court upon this question of fact raised by the objections to the jurisdiction. As no bill of exceptions was preserved, we are unable to say upon what evidence the district court acted in determining the question of fact. This court has repeatedly held that, where affidavits are used on the hearing of a motion, or in support of or against the issuance of a temporary injunction, if they are not preserved in a bill of exceptions, they will not be considered in this court. *Jordan v. Jackson,* 76 Neb. 15; *State v. Jessen,* 66 Neb. 515. It has also been held that affidavits found in the files of the case or attached to the transcript cannot be considered as having been used in support of a motion, unless they are included in the bill of exceptions. *Loar v. State,* 76 Neb. 148. Other cases which hold to the same doctrine are: *First Nat. Bank v. Carson,* 48 Neb. 763, and *Mercantile Trust Co. v. O'Hanlon,* 58 Neb. 482. See, also, *Reid, Murdoch & Co. v. Panska,* 56 Neb. 195, and *Miles v. State,* 74 Neb. 684.

There can be no doubt that the same rule applies to every question of fact which must be determined by the district court upon evidence, whether oral or by affidavits. This court is not at liberty to consider any affidavits that

may appear in the transcript as having been used upon any contested question of fact determined by the district court, unless such affidavits are preserved in a bill of exceptions. It is a well-recognized rule that every presumption and intendment will be indulged in favor of the rulings and judgment of a court of record. On account of the absence of any bill of exceptions, we are unable to say that the district court erred in overruling the objections to the jurisdiction. The presumption is that the ruling was correct. There was no apparent error in the order of the trial court in overruling the objections to the jurisdiction, and, plaintiff having refused to further prosecute the case by filing a petition, it was proper for the district court to dismiss the plaintiff's action.

No error being apparent in the record, it is recommended that the judgment of the district court be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

RICHARD BISHOP ET AL., APPELLANTS, V. IRA B. HUFF ET AL., APPELLEES.

FILED MAY 21, 1908. No. 15,206.

1. **Pleading**: CONSTRUCTION. The rule that under the code pleadings should be liberally construed does not apply in applications for any extraordinary writ.

2. **Petition** set out in the opinion examined, and *held* not to state facts sufficient to constitute a cause of action for equitable relief.

3. **Pleading**: DEFECT OF PARTIES: WAIVER. A defect of parties appearing on the face of the petition must be objected to by demurrer on that ground or it will be waived.

4. Appeal: LAW AND EQUITY CASES. A clear distinction exists in this state between an appeal in an action at law and an appeal in a suit in equity. In the latter case the appellate court does not merely review the actions of the trial court, but affords a retrial.

APPEAL from the district court for Harlan county: ED L. ADAMS, JUDGE. *Affirmed.*

C. M. Miller and *J. M. Mohney,* for appellants.

John Everson and *Gomer Thomas, contra.*

FAWCETT, C.

Plaintiffs, nine in number, brought suit in the district court for Harlan county against "Ira B. Huff, George R. Greer, and Peter Nielsen, as the board of trustees of the village of East Oxford." In their petition plaintiffs allege that they are residents and taxpayers of said village of East Oxford, and that the suit was brought by them on their own behalf and on behalf of all other taxpayers similarly situated who might come in and contribute to the expense of the suit. In the third paragraph they allege that the board of trustees had audited and allowed a large number of claims or accounts against the village in large sums, the amount of which is unknown to the plaintiffs; that the village clerk had issued warrants therefor, which the treasurer had paid, all of which they say was illegal because the board of trustees had not complied with the law by first passing an ordinance known as the annual appropriation bill; that "the said board has entirely failed to pass the said annual appropriation bill, and, having proceeded to apply the moneys raised by taxation, license and other sources of income to the payment of said claims and accounts heretofore audited, allowed and paid, have made themselves liable as individuals for the payment of the same." The fourth paragraph of the petition alleges that the board had contracted a large number of accounts that were not necessary to be contracted, had used the money of the village for the purpose

of constructing sidewalks, also for street crossings and grading the streets of the village, without having passed the annual appropriation bill, appropriating certain definite sums of money for the purposes for which the said sums had been allowed and paid; that no appropriation bill had been passed for sidewalks, street crossings, or for any other improvements, or to defray any other expense of the said village, "but that said board of trustees have audited, allowed, and paid for all expenses and improvements without having first appropriated any sum or sums whatever for the payment of the same, and without having called a special election at which any appropriation has been submitted to the legal voters of said village, and without having secured the assent of the electors of said village by petition signed by them appropriating money for any of the sums so audited, allowed and paid." There is a prayer for an accounting and injunction. It is clear that no injunction could issue for any of the matters set out in these two paragraphs of the petition, as all of the wrongs there complained of had already been committed, and, if the facts alleged create any liability against the defendants, it is a liability enforceable only in an action at law, and not by a suit in equity for an accounting.

Paragraph 5 of the petition alleges that at the last general election the question of abolishing the village was duly submitted to the electors, who voted in favor of abolishing the said corporation, but, notwithstanding the result of the election, the board of trustees is still continuing to act and planning to make further contracts. There is absolutely no evidence in the record before us to sustain the allegations of this paragraph.

Paragraph 6 is evidently the one upon which plaintiffs base their claim for relief by injunction. It reads as follows: "Plaintiffs further represent that, unless the said defendants are restrained by injunction, they will proceed to contract further indebtedness against the said village, and will audit, allow and pay the same without having had the said annual bill aforesaid, and will thus

wrongfully and illegally appropriate the money now in the treasury of the said village for the payment of such claims, and will also contract obligations against the said village that will have to be liquidated by the taxation of the citizens of said village in the future, and these plaintiffs and the electors of said village have no adequate remedy at law." Defendants insist that this paragraph of the petition does not state facts sufficient to constitute a cause of action for the equitable relief prayed. We think this contention is sound. Section 88, art. I, ch. 14, Comp. St. 1907, upon which plaintiffs rely, is as follows: "The mayor and council or board of trustees shall have no power to appropriate, issue, or draw any order or warrant on the treasurer for money, unless the same has been appropriated or ordered by ordinance, or the claim, for the payment of which such order or warrant is issued, has been allowed according to the provisions of this chapter, and appropriations for the class or object out of which such claim is payable has been made as provided in section 86. Neither the city council or the board of trustees nor any department or officer of the corporation shall add to the corporation expenditures in any one year anything over and above the amount provided for in the annual appropriation bill for that year, except as herein otherwise specially provided; and no expenditure for any improvement, to be paid for out of the general fund of the corporation, shall exceed in any one year the amount provided for such an improvement in the annual appropriation bill; provided, however, that nothing herein contained shall prevent the city council or board of trustees from ordering, by a two-thirds vote, the repair or restoration of any improvement, the necessity of which is caused by any casualty or accident happening after such annual appropriation is made. The city council or board of trustees may, by a like vote, order the mayor or chairman of the board of trustees and finance committee to borrow a sufficient sum to provide for the expense necessary to be incurred in making any repairs or restoration of improve-

ments, the necessity for which has arisen, as is last above mentioned, for a space of time not exceeding the close of the next fiscal year, which sum, and the interest, shall be added to the amount authorized to be raised in the next general tax levy, and embraced therein. Should any judgment be obtained against the corporation, the mayor, or the board of trustees, and finance committee, under the sanction of the city council or board of trustees, may borrow a sufficient amount to pay the same, for a space of time not exceeding the close of the next fiscal year, which sum and interest shall, in like manner, be added to the amount authorized to be raised in the general tax levy of the next year, and embraced therein."

All of the repairs and all of the indebtedness included within the above exceptions might lawfully be made and incurred by the village board whether an annual appropriation bill had been passed or not; and there is nothing in the language of paragraph 6 of plaintiffs' petition to negative the idea that the indebtedness which they say the defendants will proceed to contract, and the moneys which they say they are about to appropriate, may not be for the purposes named within those exceptions. If so, plaintiffs' conclusion that such appropriation would be illegal is not well founded. Plaintiffs are asking the extraordinary legal remedy of injunction, and, in order to entitle them to the writ, they must clearly show their right to such relief. The court cannot aid their allegations by construction, but, unless their right to the writ is made clearly to appear, it must be denied. *School District v. De Long,* 80 Neb. 667. In the prayer of their petition they pray for an accounting, and that the board of trustees be restrained from auditing *any* claim against said village in payment of *any* expenses incurred by them or any of them, or for the payment of *any* outstanding indebtedness of such village whatever; that the clerk be restrained from drawing and attesting, and the chairman from signing, *any* warrant or warrants against said village in payment of *any* audited accounts aforesaid, or for

the payment of *any* outstanding debts of said village, except judgments; and that the treasurer be restrained from paying *any* warrant or warrants drawn in payment of *any* outstanding indebtedness of said village whatever, except judgments. Clearly plaintiffs are not entitled to such relief, for, as shown above, any liabilities created under the exceptions noted would be perfectly valid without an appropriation bill, and the court could not restrain the board of trustees from auditing and paying the same.

Defendants contend that the petition does not state a cause of action, for the reason that only three persons are named as a board of trustees, when the law demands, and there were in fact, five trustees; but this contention cannot be sustained. Instead of demurring, defendants answered, and the rule is well settled that a defect of parties appearing on the face of the petition is waived by failure to demur on that ground. *Castile v. Ford,* 53 Neb. 507. It is also urged by defendants that the judgment below should be affirmed, for the reason that as to eight of the plaintiffs the evidence fails to show that they are taxpayers or even residents of the village of East Oxford; that it was necessary for plaintiffs to allege and prove that they were residents and taxpayers, in order to entitle them to maintain the suit; that the allegation in their petition that they were residents and taxpayers having been denied by the answer, and there being no proof whatever that any of the nine plaintiffs except plaintiff Hanners were taxpayers, the judgment of the district court in dismissing the suit was right as to them; and that, the nine plaintiffs having united in a joint appeal to this court, the judgment must be affirmed. In other words, that, as the judgment is right as to eight of the plaintiffs, and should be affirmed as to them, and the appeal being joint, it must be affirmed as to all. Counsel for defendants seem to place their reliance upon the rule stated in *City of Lincoln v. Bailey,* 5 Neb. (Unof.) 619, and cases there cited; but in *Western Cornice & Mfg. Works v. Leavenworth,* 52 Neb. 418, we held: "A clear

distinction exists in this state between proceedings by petition in error and an appeal." That (422) "in an appeal the appellate court does not merely review the actions of the trial court, but reexamines the questions presented, in effect affords a retrial of them." This being an appeal in equity triable *de novo,* we must therefore hold against defendants on this contention.

We have no reluctance in applying the strict rule of construction in this case, for the reason that an examination of the record shows that the case is really without merit. We have examined the record very carefully, and have been unable to find any evidence even tending to show that the village board was attempting to squander or misapply any of the funds of the village. They seem to have been acting in perfect good faith, and, if guilty of any wrong, it was nothing more than the technical wrong of having failed to pass the annual appropriation bill. We do not wish to be understood as asserting the doctrine that an injunction under proper allegations will not lie even for this technical failure of duty. What we mean to say is that a court will not issue the writ of injunction in such a case except when called upon to do so by the presentation of a petition which makes perfectly clear the right of the plaintiff to the writ. The petition in this case is not so framed.

We recommend that the judgment of the district court be affirmed.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

BENJAMIN F. PITMAN, APPELLANT, V. FRANCIS M. BONER ET AL., APPELLEES.

FILED MAY 21, 1908. No. 15,142.

Tax Sale: PURCHASE BY MORTGAGOR. Where a mortgagor owes a duty to the mortgagee to pay taxes upon the mortgaged property, neither he nor his assigns can acquire any right against such mortgage by purchasing the property at a judicial or administrative sale for taxes which such mortgagor ought to have paid.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

Albert W. Crites, for appellant.

Allen G. Fisher, contra.

CALKINS, C.

On the 10th day of September, 1892, the defendant Francis M. Boner was the owner of a tract of land in Dawes county, and on that day he, with his wife, the defendant Susan E. Boner, executed a mortgage thereon to one Falla M. Ball to secure the payment of the sum of $1,000 on the 1st day of September, 1897, with interest thereon payable semiannually. The mortgage contained a covenant on the part of the mortgagor to pay the taxes that might be assessed against said land, and a stipulation that, in case of the failure so to do, the mortgagee might pay such taxes and tack the amount so paid to the amount due on the mortgage. The mortgagors made default in the payment of the instalment of interest due September 1, 1894, and that as well as the succeeding instalments of interest and the principal sum secured by said mortgage remain wholly unpaid. The mortgagors also failed to pay the taxes levied against said land for the years 1892 to 1898, inclusive, and the same were by the treasurer of said Dawes county sold therefor to one Carly, who, on December 22, 1899, brought a suit to foreclose such

tax lien, making both the mortgagors and the mortgagee defendants; service being had upon the latter by publication. A decree was obtained in that suit February 26, 1900, and six days thereafter the mortgage to Ball was by him assigned to plaintiff. Under this decree the premises were offered for sale and bid off by one James H. Dunn, and this sale was by the district court confirmed. From the order confirming such sale the Boners appealed to this court, but filed no brief, and when the case was reached for submission suggested their desire to redeem, and moved for the issuance of a satisfaction certificate. Pitman, the plaintiff in this action, intervened, and filed an objection to the granting of leave to redeem, unless allowed without prejudice to his mortgage, and he also asked leave to redeem as mortgagee. No specific action was ever taken on either of these applications, but this court prepared and filed a memorandum opinion holding that the Boners were entitled to redeem from sale, while Pitman was entitled to redeem from the taxes. On April 30, 1902, the defendant Alexander paid into the court below the amount of the bid, with 12 per cent. interest from the date of the sale, as assignee and grantee of the Boners, *pendente lite,* and for the redemption from such sale. He never filed any pleading of any sort, and no notice of such payment was given to Pitman. However, Susan E. Boner, the wife, on March 1, 1902, filed a motion in the court below, in her own behalf, for leave to redeem, but never paid any money into court. On May 3, 1902, Pitman filed in the court below objection to any redemption by either Boner or Alexander, unless it was done without prejudice to his mortgage, and on May 31, 1902, he also filed an application to redeem, and paid into court the amount necessary to pay the decree, with interest and costs. At the January term, 1903, this court dismissed the appeal, and a mandate of such dismissal was filed in the court below on February 27, 1903. Boner filed answer to Pitman's application below for leave to redeem, and,

all of such motions and said applications coming on to be heard together before Judge Westover, he held that the payment into court by said Alexander was a good and sufficient redemption from said taxes and from said sale, and was operative to free the land from the lien of said mortgage and to transfer said lien to the surplus arising on said sale. From this decision an appeal was taken to this court, which reversed the decision of the court below and remanded the case. In the opinion by AMES, C. (*Carly v. Boner,* 70 Neb. 671), it was held that the right of redemption of both mortgagor and mortgagee was established by the former judgment of the court; that redemption by the mortgagee or his grantee Alexander would discharge the decree of foreclosure and the sale pursuant to it, and satisfy the lien for taxes. A rehearing was, however, granted, upon which the judgment of reversal was adhered to, but in the opinion of HOLCOMB, C. J. (*Carly v. Boner,* 70 Neb. 674), it was held that there was no such adjudication of the question of the right of redemption as to make the interlocutory order *res judicata,* as to the rights of the respective parties to redeem, so as to become the law of the case. It was said that whether the redemption be with or without prejudice to the holder of the mortgage would seem to depend upon the force and effect of the decree under which the sale was made; that, if the lien of the mortgage is merged in or barred by the decree, the judgment in the action would seem to be an adjudication of the rights of the mortgagee in the land, from the consequences of which he could not escape, but it was held that the question was not before the court and was not determined. A mandate from this court was entered in the district court, but that court declined to make any further adjudication of the rights of the respective parties in relation to the redemption, and the present suit was then brought to foreclose the mortgage in question. The district court held that the mortgage was satisfied by the decree in *Carly v. Boner, supra,* and the redemption therefrom, dismissed the plain-

tiff's petition, decreeing the satisfaction of the mortgage and canceling the record thereof. From this decree plaintiff appeals. His contention is that the district court erred in holding that his mortgage was satisfied by the decree foreclosing the tax lien and the payment to the clerk of the district court by defendant Alexander of the amount bid on the sale under said decree, with 12 per cent. interest thereon; while the defendants claim that such was the effect of the attempted redemption. Extended arguments have been presented on this point, and we are asked to again consider the effect of section 497*a* of the code, called the "redemption statute." That section was construed in *Swearingen v. Roberts*, 12 Neb. 333, and we are now asked to overrule that decision. While we think the dissenting opinion in that case is the more logical, and better accords with our view of the true meaning of the statute, yet if the rule there announced is to be changed we prefer that it be done by legislative enactment. But as the judgment must be reversed upon other grounds, it is unnecessary to consider the effect of that statute. It appears that, at the time defendant Alexander attempted to redeem, he did so as assignee of the defendants Boner, and his rights could be no greater than theirs. It is a general principle, applicable to purchasers at tax sales, that a purchase by one whose duty it is to pay the taxes operates as a payment of them, and he acquires no right against the party to whom he owed such duty by his neglect to perform the same. Cooley, Taxation (2d ed.), p. 467. This principle is said by Judge Cooley to be universal, and so entirely reasonable as to scarcely need the support of authorities. To pay the taxes on the land in question was a duty which the mortgagors owed to the plaintiff in this case, and while there is in defendants' brief an extended argument for the right of the wife of the mortgagor to purchase at tax sale where the duty to pay the taxes is incumbent on the husband, that question is not here presented. The defendant Alexander acquired whatever right he had through a con-

veyance made by both of the defendants, pending the litigation, and he could acquire thereby no right superior to those of his grantors, from whom he derived his title. The principle referred to has been extended, and we think justly, to judicial sales for taxes. *Shrigley v. Black*, 66 Kan. 213. It would be violative of fundamental equitable principles if a mortgagor, by neglecting to discharge taxes which he has covenanted to pay, were permitted to acquire title at a sale for such taxes, either administrative or judicial, and thereafter set up the title so obtained to defeat his mortgage, yet such is the effect of the decree of the district court. We are of opinion, therefore, that neither of the defendants can set up any right obtained by or through the tax foreclosure proceedings, as against the rights of the mortgagee herein.

In this view of the case, we think the proceedings in the tax foreclosure constitute no defense to plaintiff's action to foreclose his mortgage, and we therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance therewith.

REVERSED.

MARY BUTLER, APPELLANT, V. MANILLIOUS LIBE, APPELLEE.*

FILED MAY 21, 1908. No. 15,146.

1. **Pleading: STRIKING AMENDED PETITION.** Where the additional matter set up in an amended petition does not entitle the plaintiff to any further or different relief than he might have demanded under his original petition, the court cannot commit error in striking such amended petition from the files.

* Rehearing denied. See opinion, p. 744, *post*.

2. Tax Sales: REDEMPTION. The right of redemption from sales of real estate for the nonpayment of taxes, given by the constitution, applies to judicial as well as to administrative sales. The confirmation of such judicial sales applies only to the regularity of the proceeding, and in no way adjudicates the right of redemption from such sale. It follows that redemption may be made upon the payment to the purchaser of the amount of his bid, with 12 per cent. interest thereon to the time of such redemption, together with the amount of subsequent taxes paid by defendant, with interest thereon at the rate borne by such subsequent taxes under the statute.

APPEAL from the district court for Holt county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

W. R. Butler, for appellant.

A. F. Mullen and *M. F. Harrington, contra.*

CALKINS, C.

In May, 1901, the taxes levied against the lands in controversy for the years 1892 to 1899, inclusive, being unpaid, and the said land not having been sold by the treasurer for such taxes, the county of Holt began an action against the then owners of the land to foreclose the lien of such taxes. A decree of foreclosure and sale was entered in said action July 3, 1901, and the premises afterwards sold by the sheriff to the defendant, September 2, 1901. This sale being confirmed, the sheriff executed a deed to the defendant September 7, 1901. No right of redemption was reserved in the decree or order of confirmation. The plaintiff having acquired the title to the land in question by a conveyance from the owner of the same, who was made defendant in the foreclosure proceedings, on the 29th day of July, 1903, began this action, in which the plaintiff sought to redeem from said sale. An amended petition was afterwards filed, wherein the plaintiff sought an accounting from the defendant, who was in possession of the land, for the rents, issues and profits thereof. After the trial the court struck the amended petition from the files, upon a showing that it

was filed out of time, and that the attorneys for the defendant had no notice thereof. Judgment was thereupon rendered dismissing the plaintiff's petition and quieting the title to the land in the defendant, and, from this judgment, the plaintiff appeals.

1. The first error complained of by the plaintiff is the striking of the amended petition from the files. The only difference between the amended petition and the original was that, in addition to the relief sought by the original petition, the amended petition demanded an accounting from the defendant of the rents and profits of the land while in his possession. We need not determine whether, in an action brought to redeem upon a sale for taxes, the plaintiff may in any case have an accounting of the rents and profits after the offer to redeem and during the pendency of the foreclosure proceedings. He certainly is not entitled to such relief where he does not make an unconditional offer to pay the taxes, interest, penalties and costs of the foreclosure proceedings. While a defendant who comes into possession under a foreclosure decree takes the property subject to the owner's right of redemption in all cases where such right exists, his holding is a lawful one until the person having the right of redemption shall have unconditionally tendered to him the amount which he is required to pay as a condition of exercising such right of redemption. No such unconditional offer is shown in this case. On the other hand, the plaintiff in his petition questions the right of the defendant to be repaid the costs of the action of foreclosure and sale had thereunder, and only offers to pay the same in case the court shall decree that the defendant is entitled thereto. As the additional matter set up in the amended petition did not entitle the plaintiff to any greater relief than he might demand under his original petition, the court could not have committed any error in striking it from the files.

2. The right of redemption from all sales of real estate for the nonpayment of taxes within two years after the

sale, given by section 3, art. IX of the constitution, has been held to apply to judicial as well as administrative sales. *Logan County v. Carnahan*, 66 Neb. 685. And in *Selby v. Pueppka*, 73 Neb. 179, it is further held that the confirmation of such judicial sale applies only to the regularity of the proceeding. It decides the sale valid and regular, but in no way adjudicates the right of redemption from it, and the court's action must be held to have been taken with this right in view. Of course, in this view that confirmation, like the other proceedings in the sale, was had provisionally and subject to the right of redemption, the costs of the sale, as well as the costs of foreclosure, should be added to the taxes and interest in making the redemption. These questions were again before this court in *Wood v. Speck*, 78 Neb. 435, and the doctrine laid down in *Selby v. Pueppka, supra*, was fully adhered to. The purchaser is entitled to be repaid the amount of his bid, with interest thereon from the date of such judgment to the time of such redemption. In this case it appears that certain taxes levied subsequently to those included in the decree have been paid by the purchaser. The amount of these taxes and interest thereon must therefore be added to the amount which the plaintiff would otherwise be required to pay in order to redeem. The statute in force at the time of the adoption of the constitution (laws 1875, p. 57), in reference to the redemption of real estate levied and sold under judgment or decree, provided that an owner of such real estate redeeming after sale and before confirmation should, in cases where the property is purchased by any person not a party plaintiff, pay said purchaser 12 per cent. interest on the amount of the purchase price from the time of sale to the date of redemption. The effect of the constitutional provision above quoted was, as we have seen, to extend the time in which redemption can be made in cases of sales under decrees for the foreclosure of tax liens, but is not inconsistent with the provision fixing the rate of interest upon the amount of the bid.

It follows that the district court should have rendered a judgment permitting the plaintiff to redeem by paying the defendant the amount of his bid, with interest at 12 per cent. per annum to the date of the redemption, together with such amounts as the defendant may have paid for taxes levied subsequently to those included in the decree, with interest on such payments at the rate of interest borne by delinquent taxes under the statute, and, since the plaintiff did not offer to pay these amounts, such redemption should be upon the further condition that he pay all the costs of this action in the district court.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance therewith.

REVERSED.

The following opinion on motion for rehearing was filed September 16, 1908. *Rehearing denied:*

PER CURIAM.

Plaintiff in her application for a rehearing strenuously contends that she should be permitted to redeem by paying 7 per cent. instead of 12 per cent., as required by our judgment, and that we are committed to the former rate by *Logan County v. McKinley-Lanning L. & T. Co.*, 70 Neb. 399, 406; *Selby v. Pueppka*, 73 Neb. 179; *Wood v. Speck*, 78 Neb. 435, and *Squire v. McCarthy*, 77 Neb. 431. We find upon an examination of those cases that the question of the rate of interest was not discussed in any of them. It seems to have been assumed and taken for granted that the legal rate of interest provided for the witholding of money due governed in such cases. The

question having now been squarely raised in this case, we have, after an examination of the statute, concluded that, where land sold under a decree foreclosing a tax lien is purchased by any person other than the plaintiff in the case, the owner, in order to redeem, must pay the purchaser the amount of his bid, with 12 per cent. interest thereon. Wherever any contrary expressions have been made use of in our former decisions they should be treated as mere *obiter dicta.*

The motion for rehearing is therefore

OVERRULED.

WILLIAM W. MORSE, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED MAY 21, 1908. No. 15,172.

1. **Limitation of Actions.** Where by the negligent construction of a railway embankment and ditches, surface water is discharged upon the land of an adjoining proprietor and his crops thereby injured, such party's cause of action accrues at the date of the injury, and not at the date of the construction of the embankment and ditches.
2. **Railroads:** DUTIES OF LESSEE. Since the duty of maintaining a railroad in suitable and proper condition so as not to unnecessarily injure adjoining proprietors is a continuing one, it is assumed by the lessee of such railroad.
3. **Evidence:** NEGLIGENCE. The question of negligence is for the jury, and it is not necessary to call expert witnesses to give an opinion upon the question whether a railroad was negligent in the manner of constructing and maintaining its roadbed.
4. **Damages:** EVIDENCE. Where the planting of land to a perennial crop, like alfalfa, increases the market value of such land, it is proper to show the damage done by the destruction of a stand thereof by proving the value of the land with and without such stand.
5. ———. The measure of damages for the destruction of a growing crop is the value thereof in the condition in which it exists at the time of its destruction.
6. Instructions requested by defendant examined, and no error found in refusing the same.

APPEAL from the district court for Franklin county: ED L. ADAMS, JUDGE. *Reversed.*

James E. Kelby, Byron Clark, Frank E. Bishop and *Fred M. Deweese,* for appellant.

W. H. Miller and *George W. Prather, contra.*

CALKINS, C.

The railroad hereinafter mentioned was built by the Republican Valley Railroad Company in 1880, sold to the Chicago, Burlington & Quincy Railroad Company in 1884, and leased to the defendant in 1901. Near Bloomington, in Franklin county, the road was constructed east and west at the foot of the bluffs and in the valley on the north side of the Republican river. At and near the Bloomington station the railroad crossed a "draw," running in a southerly direction, and its embankment intercepted the natural course or flow of water collected by such draw in times of rainfall. A ditch had been constructed for a short distance west on the north side of the railroad, where a culvert was provided, through which the water flowing down said draw and through said ditch was discharged upon a tract of level land lying south of the railroad tracks. Some time in 1894 the plaintiff became the owner of this tract of land, and in 1903 the water discharged through the culvert in question flooded the plaintiff's land, and destroyed about 30 acres of alfalfa and the same number of acres planted to corn. In 1904 this land was again flooded in the same manner, damaging or destroying 15 acres of cane and 35 acres of corn. This action was brought by the plaintiff to recover such damage, on the ground that the same was caused by the negligent construction and operation of the said railroad. There was a trial to a jury, and, from a verdict rendered for the plaintiff upon a judgment therein, the defendant appeals.

1. The first point made by defendant is that the plain-

tiff's petition does not state facts sufficient to constitute a cause of action, and the second is that the action is barred by the statute of limitations. As these two points are supported by the same arguments they will be considered together. The defendant argues that the ditch and embankment complained of were permanent, and that the injury done to plaintiff was a natural result of the proper construction of a railroad, and was included in the damages done to the land owned by plaintiff at the time the right of way was taken. It is contended that the plaintiff should have anticipated all the injury that might accrue to his land by reason of any defective construction of defendant's road, and should have brought his action within the statutory period from the date of the completion of the road, and that, since it appears upon the face of the petition that more than ten years have elapsed since said construction, there can be no recovery. This is not the law. A man is not required to anticipate an injury from the probable negligence of some one else. The statute of limitations does not run until the injury has been actually received. *Fremont, E. & M. V. R. Co. v. Harlin,* 50 Neb. 698; *Chicago, B. & Q. R. Co. v. Emmert,* 53 Neb. 237; *Chicago, R. I. & P. R. Co. v. Andreesen,* 62 Neb. 456; *Missouri P. R. Co. v. Hemingway,* 63 Neb. 610; *Chicago, B. & Q. R. Co. v. Mitchell,* 74 Neb. 563; *Chicago, R. I. & P. R. Co. v. Ely,* 77 Neb. 809.

2. The determination of the foregoing questions logically disposes of the defendant's plea that, because it is the lessee, it is not liable for damages resulting from the negligent construction of the ditch and embankment by the original owner. The duty of maintaining a railroad in suitable and proper condition so as not to unnecessarily injure adjoining proprietors is a continuing one, and is by no means ended with the first construction of the road. Ditches have a tendency to fill, embankments wear away, surrounding conditions change, and experience often demonstrates defects in the original design. The duty to meet these changing conditions with reasonable care and pru-

dence is a continuous and never-ending one. From its very nature this duty could not have been fulfilled by the original owner in advance for the period of the term of the lease or for any other period. It was a duty which could only be discharged from day to day and from time to time in the maintenance and operation of the road, and was therefore a duty which could only be performed by the lessee, who was the owner for the time being. We do not decide whether the lessor might be jointly held with the lessee; but we are satisfied that the latter is liable to the same extent as the former would have been had it continued in possession.

3. The defendant contends that the verdict is not supported by sufficient evidence, in that there is no showing whatever as to its unnecessarily or negligently injuring plaintiff. If it is meant by this that no expert witness was called to pass judgment upon the method used by defendant in maintaining its roadbed at this point, the answer must be that such testimony was not necessary. The evidence sufficiently shows what was done and what the result was; and it was a question for the jury whether the defendant was chargeable with negligence. *Fremont, E. & M. V. R. Co. v. Harlin, supra.*

4. The plaintiff offered evidence tending to prove that the overflow of water complained of killed a stand of alfalfa on about 30 acres of land in 1903, and he offered and was permitted to introduce testimony showing what the land was worth with the alfalfa growing upon it, and what it was worth without the alfalfa. In this we discover no error. It is well known that seeding to alfalfa is a hazardous process, the result of which cannot be accurately predicted, and failures often result from conditions altogether beyond the control of the husbandman. Under these circumstances, the difference in value between land having a successful stand of alfalfa and land without the same would be a safer measure of the value of such stand than would the cost of again seeding to alfalfa.

5. It is claimed by the plaintiff that 30 acres of corn

were destroyed in 1903, and 15 acres of cane and 35 acres of corn in 1904. The evidence as to the time of the destruction of these crops is very indefinite. In one place it is said that the first cutting of alfalfa was destroyed, and in another that the corn was as high as the head of the attorney for the plaintiff, and we may therefore reasonably presume that it was some time in midsummer. The only evidence offered by the plaintiff as to the crops of 1904 was concerning their value in the fall. The general rule is that the value of a growing crop in the condition in which it exists at the time of its destruction is the measure of damages. *Fremont, E. & M. V. R. Co. v. Harlin, supra; Berard v. Atchison & N. R. Co.*, 79 Neb. 830; *Chicago, B. & Q. R. Co. v. Emmert, supra.* No evidence was offered of the necessary expense of cultivating, harvesting and marketing the crop; and this estimate eliminated the chance of hail, windstorms, early frosts and other hazards to which a crop is exposed between midsummer and autumn. The amount of the verdict, $1,500, does not indicate that the jury made any substantial deductions upon its own motion, and we think the error was material.

6. The remaining errors assigned by the defendant relate to the giving and refusal of instructions. Instruction No. 2, given by the court on its own motion, is criticized on the ground that it submitted to the jury the question of the negligent construction of the roadbed, and use and operation thereof, when no such issue was made. Such an inaccuracy will probably not occur upon a second trial, and, as the case must be reversed for the reasons hereinbefore stated, it is not necessary to determine whether this instruction was prejudicially erroneous. Instruction No. 7, requested by the defendant, was prepared to present its view of the statute of limitations, which we have already considered, and it was properly refused. Instruction No. 5, requested by the defendant, was properly refused for the reason that the court had already instructed the jury that the burden of proof was upon the plaintiff

to prove the negligence charged. Instruction No. 6 was incomplete, in that it omitted the element of the defendant's duty to avoid the infliction of unnecessary damage upon the adjoining property owners.

We discover no error except that committed in the admission of the evidence relating to the measure of damages, and for that error we recommend that the judgment be reversed and the cause remanded for further proceedings according to law.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

GERALD M. DREW, TRUSTEE, APPELLEE, V. WALTER P. MYERS, APPELLANT.

FILED MAY 21, 1908. No. 15,179.

1. **Bankruptcy**: JURISDICTION. The state and federal courts have concurrent jurisdiction of an action brought by a trustee in bankruptcy to avoid a preference or to recover property fraudulently conveyed by the bankrupt. Of all other actions brought by the trustee to recover property belonging to the bankrupt, the state court has sole jurisdiction.
2. ———: PLEADING. Where a trustee in bankruptcy seeks to recover the property of the bankrupt in an action which the bankrupt might have prosecuted, but for the intervention of the bankruptcy, he is not required to allege that he has not sufficient assets of the estate in his hands to pay the liabilities thereof. Such allegation is only necessary when the action is brought to avoid a preference or fraudulent conveyance made by the bankrupt. *Flint v. Chaloupka*, 81 Neb. 87, distinguished.
3. **Evidence** examined, and *held* sufficient to sustain the finding of the trial court.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Britt & Cunningham, for appellant.

Richard S. Horton and *Gerald M. Drew, contra.*

CALKINS, C.

The Keystone Coal & Supply Company was a corporation doing business in the city of Omaha, and was, by the district court of the United States for the district of Nebraska, adjudged a bankrupt upon an involuntary petition filed December 1, 1905. The plaintiff, who is the trustee appointed in said bankruptcy proceedings, brought this action against the defendant Myers and the City Savings Bank, charging that a deposit made by Myers in said bank was the property of said bankrupt. He alleges the insolvency of the defendant Myers, and asks to have said moneys declared the property of such bankrupt, and the defendant Myers restrained from withdrawing such funds from the bank, and the bank from paying out the funds to the defendant Myers or his order. The district court found for the plaintiff, and entered a decree in his favor, from which this appeal is prosecuted.

1. The defendant contends that the state court had no jurisdiction of this suit. Unless there is some provision in the bankruptcy act depriving the state courts of such jurisdiction it must be assumed. Until the amendment of 1903 to the bankruptcy act such actions could only be brought in the state courts. *Hicks v. Knost,* 94 Fed. 625, affirmed in 178 U. S. 541. Since the amendment of 1903, suits for the recovery of property under section 60, subd. *b,* and section 67, subd. *e,* may be brought in either the state or the federal courts. Subdivision *b* of section 60 relates to the recovery of property conveyed by the bankrupt in violation of the provisions of the act forbidding preferences, and is as follows: "If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable

by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction." U. S. Comp. St. (Supp. 1907), p. 1031.

Section 67*e* (U. S. Comp. St. [Supp. 1907], p. 1032) of the bankruptcy act refers to fraudulent conveyances made by the bankrupt, and provides that any state court which which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction of such actions. It is plain from the reading of these sections that, if this action was to avoid a preference or to recover property fraudulently conveyed by the bankrupt, the state court would have concurrent jurisdiction with the federal court of the same. Of all other actions brought by the trustee to recover property belonging to the bankrupt the state court retains sole jurisdiction.

2. It is contended that the petition fails to state facts sufficient to constitute a cause of action, in that it does not allege that the property in the hands of the trustee is insufficient to discharge the debts of the bankrupt, and the case of *Flint v. Chaloupka,* 81 Neb. 87, is cited to sustain that position. The rule enunciated in *Flint v. Chaloupka* and the cases cited to support the same is restricted to cases brought by the trustee to avoid preferences or to recover property conveyed by the bankrupt in fraud of the creditors. The reason for the rule is that such actions are essentially in the nature of creditors' bills, and that the insufficiency of the property left in the debtor's hands after making fraudulent conveyances is an essential element of the right of the creditor to question such conveyances. Here the plaintiff claims that defendant's father, who was an officer of the bankrupt corporation, taking advantage of his position, withdrew or possibly embezzled some $500 of its funds, which he turned over to the defendant, his son, and which was by him deposited in the defendant bank. In such a case the

bankrupt, but for the appointment of the trustee, could have maintained this action to recover such money. We think it safe to say that the trustee of a bankrupt may maintain any action which the bankrupt might have maintained but for the intervention of the bankruptcy, and that it is not necessary in such a case for him to state that the property already in his hands is insufficient to pay the debts of the bankrupt. It is only when he brings an action which is in the nature of a creditors' bill that he is required to make such allegation.

3. The defendant insists that the evidence is insufficient to sustain the finding of the district court. It appears that J. F. Myers was the secretary of the corporation, and that his son, the defendant Walter P. Myers, was an employee thereof; that during the last days of the existence of the corporation, and while its financial dissolution was imminent, J. F. Myers overdrew his account with the corporation some $500 or $600, and that he paid practically the same sum to his son Walter, who deposited a like amount in the defendant bank. It is claimed that J. F. Myers was indebted to his son, the defendant, and that this money was paid in the discharge of such debt. It was also claimed that J. F. Myers received money from other sources; but, after making all possible allowances for money so received, the evidence is irresistible that the amount for which the district court finally rendered judgment, to wit, $433.12, was taken by J. F. Myers from the funds of the company, paid to his son, the defendant Walter, and by him deposited in the defendant bank. That this money was wrongfully taken from the corporation cannot be questioned; and that the defendant received the same, knowing the source from whence it came, can reasonably be inferred from the circumstances; and this inference is not satisfactorily overcome by the testimony of the defendant himself.

We therefore recommend that the judgment of the district court be affirmed.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

BERNARD MCNENY, APPELLEE, V. AMBROSE S. CAMPBELL ET AL., APPELLANTS.*

FILED MAY 21, 1908. No. 15,190.

1. **Principal and Agent:** LIABILITY OF AGENT. Where an agent negotiates a sale of real estate for the broker with whom the purchaser makes a contract, he is not for that reason liable jointly with the vendor for a return of the purchase price paid, in a case where the vendor fails to make the conveyance.
2. **Vendor and Purchaser:** RESCISSION. Where one is so situated with reference to a tract of land that he can acquire the title thereto either by the voluntary act of the parties holding the title or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof; and, where he does make such agreement, the fact that the purchaser understood him to be possessed of the legal title does not constitute a ground for rescission of the contract, especially where it appears that such purchaser did not rely upon the existence of the legal title in the vendor.
3. **Process.** To authorize summons to another county in a merely personal action for money, there must be an actual right to join the resident and nonresident defendants.

APPEAL from the district court for Webster county: ED L. ADAMS, JUDGE. *Reversed with directions.*

P. W. Scott, C. W. Meeker and *L. H. Blackledge*, for appellants.

E. U. Overman and *Bernard McNeny, contra.*

CALKINS, C.

The defendants Burke and Campbell were real estate dealers and brokers at Imperial, in Chase county. The

* Rehearing denied. See opinion, p. 761, *post.*

defendant Carpenter, who resided in Red Cloud, in Webster county, was engaged in the business of selling lands in Chase county, soliciting purchasers in the locality of his residence and accompanying them to the western part of the state, sometimes cooperating with the local agents. He was not a member of the firm of Burke & Campbell, but had received commissions from them in cases where he had found buyers for lands which they owned or had for sale as brokers. In September, 1906, he accompanied one Joshua Rushton from Red Cloud to Chase county and introduced him to the defendants Burke & Campbell, who, with his assistance, made a sale to Rushton of certain Chase county land upon contract, for the price of $4,800, $450 of which was paid cash in hand. On this sale Carpenter was paid a commission by Burke & Campbell. An abstract of title to the land was prepared, to which Rushton made objection; and such negotiations were had between the parties that this contract was canceled; and on the 11th day of October Burke & Campbell, with the assistance of Carpenter, contracted with Rushton to sell him another tract of land for the price of $4,000, of which $1,450 was paid in cash, and the remainder was to be paid on or before January 20, 1907. The cash payment was made up of the $450 paid by Rushton on the first contract and $1,000 for which he gave his check. At the time of the making of the second contract the legal title to the land therein described was in the name of Lyman Pritchard, a resident of Iowa, who had executed a lease of this and other lands, with an option of the lessee to purchase during the term at a price therein named, and this right had been assigned to and was held by Burke & Campbell.

Prior to January 20, 1907, Burke & Campbell, at the request of Rushton's attorney, sent to him an abstract, which showed the title to the land in Pritchard, subject to a mortgage of $1,100. At or before this time Burke & Campbell had taken steps to avail themselves of the option to purchase contained in the lease, and to secure the

satisfaction of the mortgage and the making of a deed from Pritchard to Rushton. Rushton's attorney had written Burke & Campbell to postpone the date for the final closing of the transaction to January 23; but on January 17 Rushton, having become dissatisfied because, as he claims, the title appeared to be in Pritchard, instead of Burke & Campbell, decided to sell the contract for what he could get, and disposed of the same to the plaintiff for $50. The plaintiff immediately went to Imperial, and on the 21st day of January, 1907, tendered to Burke & Campbell the remainder of the payment and demanded from them the deed. This they were unable to furnish at that time, but they informed the plaintiff that they were expecting the arrival of the deed, and that they had received a letter from Mr. Rushton's attorney asking them to postpone the date of final payment until the 23d. The plaintiff remained in Imperial until the 23d, at which time he demanded repayment of the $1,450 paid by Rushton, but he does not appear to have again tendered the remainder of the purchase price. On the 24th of January Burke & Campbell received from Pritchard the satisfaction of the mortgage and the deed to Rushton, which they offered to deliver upon payment of the purchase price. On January 30 the plaintiff filed his petition in this case in the district court for Webster county, joining Burke & Campbell with the defendant Carpenter. Summons was served upon Carpenter in Webster county, and a summons directed to the sheriff of Chase county was there served upon the defendants Burke & Campbell. The petition followed the form of the common law count in assumpsit for money had and received. It charged that the defendants became indebted to one Joshua Rushton in the sum of $1,450 for so much money received from said Rushton on or about the 11th day of October, 1906, to and for the use of said Rushton, and alleged that Rushton had assigned his cause of action to the plaintiff, who had demanded and had been refused payment of the said sum. The answer of Carpenter was

a general denial. The answer of Burke & Campbell challenged the jurisdiction of the court, and set up the fact that the $1,450 was received as payment upon the contract for the sale of the land, which they were ready to perform, and denied the other allegations of the petition. To this answer the plaintiff filed a reply, setting up that the defendants obtained the said contract by making false representations as to the ownership and value of the land; that he had, on the 22d day of January, 1907, rescinded the contract on account of such fraud, and because the defendants were unable to deliver title as agreed; and that he had demanded a return of the $1,450. A jury was waived, and the cause tried to the court, who found for the plaintiff. From a judgment upon this finding, the defendant Carpenter and Burke & Campbell severally appeal.

1. The defendants insist that the petition did not state a cause of action; that Carpenter was improperly joined, and that the district court for Webster county therefore obtained no jurisdiction over the defendants Burke & Campbell; and, finally, that the evidence failed to show either fraud or any state of facts which entitled the plaintiff to rescind the contract and recover the money already paid thereon.

Assuming that the failure of the defendants Burke & Campbell to convey this land by a good and sufficient warranty deed at the time such conveyance was demanded of them by the plaintiff entitled the plaintiff to recover the amount paid by his assignor on the contract, it is clear that such action existed only against the defendants Burke & Campbell. They had received the money and made the contract to convey, and the fact that the defendant Carpenter had acted for them as an agent in securing the purchaser or making the sale, and had received compensation therefor, would not make him liable for a return of the money on account of Burke & Campbell's failure to make the title good. That was their liability alone.

2. If Burke & Campbell confederated with Carpenter,

and they together made false representations material to the contract, and thereby secured the money of plaintiff's assignor, they would be liable to the plaintiff jointly and severally. We therefore proceed to examine the question as to whether any fraud which would entitle the plaintiff's assignor to avoid the contract is shown by the evidence to have been practiced upon him. In the reply of the plaintiff this fraud is alleged to have been perpetrated by false statements, first, as to the value of the land; and, second, as to the ownership of the same. With reference to the first question there is absolutely no evidence in the record to show that the land was worth less than it was represented to be. Rushton himself saw and examined the land, and in such a case evidence as to false statements of value, which are always largely a matter of opinion, must be very clear in order to avoid the contract.

Upon the question of false representations as to the ownership of the land, it is admitted that the legal title was in Pritchard; that Pritchard had given a lease with an option to the lessee to purchase; and that this lease and right of purchase was held by Burke & Campbell at the time of making the contract. It is conceded that it was valid and enforceable. When one is so situated with reference to a tract of land that he can acquire the title thereto either by the voluntary act of the parties holding the title or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof. *Easton v. Montgomery,* 90 Cal. 307; *Townshend v. Goodfellow,* 40 Minn. 312; *Dresel v. Jordan,* 104 Mass. 407. The contract made by the defendants Burke & Campbell provides that they shall transfer by warranty deed, together with abstract posted to date showing clear title to the land in question. The claim that the defendants represented that the title was in Burke & Campbell is based upon the testimony of Rushton, who states that Carpenter, on the way to Imperial, told him the land was absolutely clear and belonged to Burke & Campbell.

His testimony as to what occurred at the time of the making of the contract is as follows: "Q. Who was there when the contract was drawn up? A. Mr. Carpenter, Mr. Campbell and myself. Q. Now, was there anything said at that time by either Mr. Carpenter or Mr. Campbell about the title to the land? A. Yes, sir. Q. What was said? A. They said they owned the land. The parties that sold it to me. That was my understanding. Burke & Campbell owned the land. Q. That they had the title to the land? A. That was my understanding." The situation was, as we have seen, that Burke & Campbell were making this contract on their own behalf, and not as brokers for some other owner, and that, while they did not have the legal title for it, they did have a valid and enforceable contract by which they could acquire such title. The testimony of Rushton does not attempt to give the language of the defendants, and amounts to no more than that he understood the title to be in Burke & Campbell. One of the essential elements of fraud practiced by means of false representations is that the representation, must be concerning a matter material to the contract. Had the purchaser taken steps to have the contract acknowledged and recorded, he would have shown by such conduct a reliance upon the fact of the title being in Burke & Campbell, which does not appear from what he actually did. By not taking steps to give notice of his rights in the land by registering his contract, he relied upon the personal undertaking of Burke & Campbell. Had the legal title been in them at the time of the execution of the contract, he would have obtained no greater assurance for its performance than he had as it actually was, and he was not, therefore, injured by the fact that the legal title was not in his vendors at that time. The alleged misrepresentation not being concerning a matter material to the contract, nor calculated to injure the plaintiff, does not constitute such fraud or deceit as would entitle the plaintiff to a rescission of the contract on that ground. *Sonnesyn v. Akin,* 14 N.

Dak. 248, and cases there cited; *Provident Loan Trust Co. v. McIntosh*, 68 Kan. 452.

3. The plaintiff having failed to show that the defendants confederating together obtained the money of the plaintiff's assignor by fraudulent representations, he has failed to establish a joint cause of action against the defendant Carpenter and the defendants Burke & Campbell. We may admit the sufficiency of the petition, the right of the plaintiff to rescind the contract and recover back the purchase price for the failure of Burke & Campbell to convey, and yet this constitutes no cause of action against the defendant Carpenter. The action, being personal and for the recovery of money only, does not fall within any exception to the general rule formulated in section 60 of the code, which requires actions to be brought in the county in which the defendant or some one of the defendants resides or may be summoned. To authorize summons to another county in personal actions for the recovery of money only, there must be an actual right to join the resident and nonresident defendants; and the right to maintain an action of that character against a nonresident served in another county depends upon the plaintiff's really having a right to recover from the resident defendants jointly with the others. *Stull Bros. v. Powell*, 70 Neb. 152; *McKibbin v. Day*, 71 Neb. 280; *Penney v. Bryant*, 70 Neb. 127. The plaintiff in this case having shown no right of action against Carpenter, the district court for Webster county obtained no jurisdiction of the defendants Burke & Campbell, and the action should have been dismissed.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with instructions to dismiss plaintiff's petition as to the defendant Carpenter absolutely, and as against Burke and Campbell without prejudice to future action.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with instructions to dismiss plaintiff's petition as to the defendant Carpenter absolutely, and as against Burke and Campbell without prejudice to future action.

REVERSED.

The following opinion on motion for rehearing was filed October 8, 1908. *Rehearing denied:*

PER CURIAM.

In the motion for a rehearing, exception is taken to so much of our opinion as dismisses the action, and we are inclined to the belief that this exception is well taken. Our judgment is therefore modified to read, "and the cause is remanded to the district court for further proceedings."

MOTION OVERRULED.

R. B. KNUTSON, APPELLANT, V. J. F. ROSENBERGER, SHERIFF, APPELLEE.

FILED MAY 21, 1908. No. 15,197.

1. **Execution Sale:** MORTGAGED PROPERTY. Where several articles of personal property subject to the same mortgage are seized upon execution, in the absence of any direction or request on the part of the mortgagor, it is the duty of the officer to sell the property included in the mortgage *en masse*, and subject to the mortgage.

2. ———: ———. Where several articles of personal property subject to the same mortgage are seized upon execution against the mortgagor, who, after being informed that the articles cannot be sold separately without taking care of the mortgage, persists in the request that such articles be sold separately, such action on the part of the mortgagor is sufficient to support a finding that he consented to the sale of the goods free from the mortgage, and to the payment of the same from the proceeds.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

Millard & Snider and *Wilbur F. Bryant,* for appellant.

J. C. Robinson, contra.

CALKINS, C.

On or about the 19th day of January, 1906, the plaintiff was the owner of a team of horses, a wagon, harness, corn sheller, and horse power, subject to a chattel mortgage, upon which he was owing about the sum of $250. He was also the owner of a cow, calf, and a single seated buggy, which were unincumbered. Before that time one George Carmack had recovered a judgment against the plaintiff in the county court of Cedar county for the sum of $135.90 and costs, upon which judgment an execution was issued, directed to the defendant, who was sheriff of Cedar county. Under this execution the defendant seized all of the above described property, and advertised the same for sale. In his notices of sale the defendant stated that the property mentioned in said mortgage would be sold subject thereto. Before the beginning of the sale, the plaintiff requested that the different articles mentioned be sold separately. To this the defendant consented, telling the plaintiff that in such case the mortgage would have to be taken care of. The property was sold apparently for its full value, the defendant informing bidders that the mortgage would be "taken care of." Before the sale, the plaintiff in execution, Carmack, had taken up the mortgage and owned it. Out of the proceeds of the sale the defendant, after paying the costs, paid the amount due on the mortgage, and applied the remainder, some $17, on the judgment. The plaintiff brought this action against the defendant, upon the theory that he had no right to pay the mortgage debt out of the proceeds, and that the execution debtor was entitled to the surplus for the payment of the amount of

the judgment and costs. There was a trial to a jury and a verdict for the defendant, and from a judgment rendered upon such verdict the plaintiff appeals.

1. Where several articles of personal property subject to the same mortgage are seized upon execution against the mortgagor, the equity of redemption, being indivisible, cannot be subdivided by separate sales of the various articles. Freeman, Executions, sec. 296. In the absence of any direction or request on the part of the plaintiff, it was the duty of the defendant to sell the property included in the mortgage *en masse,* and subject to the mortgage. This course was intended to be pursued by him, and his advertisement gave notice that the sale would be made in this manner. He, however, contends that he proceeded to sell the articles separately at the request of the plaintiff, with the understanding that the mortgage should be discharged out of the proceeds of the sale. While the technical assignment of errors by the plaintiff is directed to the giving of instructions by the court, the real objection is that there was no evidence to support the same; and the only question presented by this appeal is whether the evidence was sufficient to support a finding that such a request was made, and such an understanding had.

2. A party cannot be heard to complain of an error which he himself has been instrumental in bringing about. *Missouri P. R. Co. v. Fox,* 60 Neb. 531. And since it is impossible to sell separately different articles included in the same mortgage, subject to the lien of such mortgage, the request of the execution debtor that the articles be sold separately may well be regarded as tantamount to an agreement on his part that they shall be sold free from the lien of the mortgage, and that such lien may be discharged out of the proceeds of the sale. It is not necessary, however, to go so far as this to uphold the verdict in this case. The defendant, after testifying that the plaintiff requested him to have this property sold separately, says: "I told him if we sold it separately we would have to take care of the mortgage. 'Well,' he says, 'I want to

see it sold separately.'" We think this evidence sufficient to support a finding that the plaintiff, in consideration of the advantages to be obtained by selling the articles separately and free from the mortgage lien, consented that the mortgage might be discharged out of the proceeds of the sale. The plaintiff suffered no actual injury by the conducting of the sale in this manner. The mortgage is admitted to have been a valid and subsisting lien; and it appears that the property was sold for its full value, by means of the defendant's announcement that the mortgage would be taken care of.

The plaintiff's request to sell the articles separately was made on the ground that they would realize a better price if disposed of in that manner. That advantage he has secured, with no corresponding disadvantage to himself.

We therefore recommend that the judgment be affirmed.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

PETER BOWHAY, APPELLEE, V. WILLIAM H. RICHARDS, APPELLANT.

FILED MAY 21, 1908. No. 15,214.

1. **Party Walls:** RIGHTS OF PARTIES. Where a wall is entirely upon the property of one party, the right of an adjoining owner to have support therefrom, whether derived from contract or acquired by prescription, is in the nature of an easement, which is terminated upon the destruction of the building by fire.

2. ———: NOTICE TO PURCHASER. The fact that the owner of a building used a wall upon the land of an adjoining proprietor for the support of his building before the same was destroyed by fire is not such notice as charges a purchaser of the property upon which the wall is situated with knowledge of a stipulation in an unrecorded written contract that the owner of such

building might renew the use of such wall in case it should be destroyed and rebuilt.

3. Appeal. Where the judgment of the district court is proper upon the undisputed facts shown by the record, it will be affirmed, without considering whether the reasons given by the trial judge for his conclusion were competent and adequate to support the same.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

L. M. Pemberton, F. N. Prout and *W. H. Richards,* for appellant.

Sackett & Brewster, contra.

CALKINS, C.

In 1894 one Fouke was the owner of lot numbered 2 in the town of Liberty, upon which there was a one-story brick building. The south wall of this building practically coincided with the south line of the lot. Fouke on October 17, 1894, made a contract with one Gifford that the latter might join this wall with a good and substantial brick or stone building on the south side of the building owned by Fouke. It was stipulated in this agreement that the floor joists should not be attached to the wall on lot 2, but that it might be used to support the roof or ceiling joists. This contract contained the following clause: "It is fully understood that so long as the present wall stands it may be used by said Gifford as a party wall, and in the event of the falling or breaking down of the said wall at any time, and in the event that a wall should be rebuilt where the present wall stands, then said Gifford shall have the right to join said wall, and it shall become a party wall as is the one for which this contract is made." It appears that Gifford was the owner of lot numbered 3, which adjoined lot numbered 2 on the south; but neither the ownership of this lot by Gifford nor its location was in any manner referred to in the written contract. Soon after

the making of this contract Gifford erected a building, using the south wall as stipulated. The contract was never recorded. Both buildings were destroyed by fire in March, 1906, leaving standing, however, a portion of the wall in question. On the 2d day of May, 1906, the plaintiff purchased lot 2, and afterwards erected a building thereon, in the construction of which he rebuilt and used the wall in question. After the completion of said wall and building on lot 2 by plaintiff, the defendant, who had purchased lot 3, began the construction of a building thereon, and sought to use the south wall for the support of the ceiling and roof joists of such building. The plaintiff thereupon brought this action, alleging sole ownership of lot 2, and asking that the defendant be restrained from interfering with or using the south wall of the building. To this petition the defendant answered, alleging ownership of lot 3, adverse possession of the wall, the making of the written contract, the assignment of the same to the defendant, and that the plaintiff bought said lot 2 with full knowledge of the existence of said written contract. There was a reply denying these allegations of the answer, and alleging the destruction of the building by fire and the consequent termination of any easement in the wall by the defendant or his grantor. Upon these issues there was a trial to the court, who found, first, the execution of the contract; second, the construction by the defendant's grantor of a building on lot 3, and the adjoining the same to the wall in question in pursuance of the contract referred to; third, the destruction of the buildings by fire; fourth, that after the fire the plaintiff purchased lot 2, and the defendant entered into a contract for the purchase of lot 3; fifth, that the contract was not filed for record nor recorded, but that plaintiff knew of the possession of the party wall and its use by the grantor of the defendant Richards, and had such notice of the rights of the defendant as to put him upon inquiry which would have disclosed full knowledge of all the terms and conditions of the contract and the rights of the parties there-

under; sixth, that the wall used by the two buildings was damaged by fire to such an extent that it could not be used again without repairs, and that the plaintiff made all such necessary repairs at his own expense and at a cost of $200; seventh, that the defendant claimed the right to join on said wall without paying any part of such repairs, and refused to pay or in any way be bound to contribute to such repairs made necessary by the fire of March, 1906. Upon these findings the court concluded as a matter of law that the defendant had no right to join his building to the wall of the plaintiff until he had first paid his proportionate share of the repairs to the wall made necessary by the fire, and rendered a judgment making the temporary injunction which had been granted at the commencement of the suit perpetual. From this judgment the defendant appeals.

1. The defendant finds no fault with the first five findings of the district court, but very strongly insists that findings 6 and 7 are neither supported by the evidence nor within the issues joined; while the plaintiff contends that the fifth finding of the court that the plaintiff had such knowledge of the rights of the defendant in the premises as to put him upon inquiry which would have disclosed the terms and conditions of the written contract is erroneous, and that the easement, if any, which the owners of lot 3 had in the south wall of lot 2 was terminated by the destruction of the buildings by fire. Where a party wall is situated on both sides of the division line, each party has title to the soil to the line, but his title is qualified by the easement which the other owner has of supporting his building by the common wall. Where, as in this case, the wall is entirely upon the property of one party, the right of the other to have support therefrom is in the nature of an easement only, and the general doctrine is that such easement ceases upon the destruction of the building by fire. *Sherred v. Cisco,* 4 Sandf. (N. Y.) 480; *Partridge v. Gilbert,* 15 N. Y. 601, 69 Am. Dec. 632; *Heartt v. Kruger,* 121 N. Y. 391, 18 Am. St. Rep. 829; *Hoffman v.*

Kuhn, 57 Miss. 746, 34 Am. Rep. 491; *Bonney v. Greenwood,* 96 Me. 335. This doctrine appears to have been first enunciated in *Sherred v. Cisco, supra,* and was quoted approvingly by Judge Denio in *Partridge v. Gilbert, supra,* and it has again been enunciated by the same court in *Heartt v. Kruger, supra.* It was said by Judge Denio in the opinion above referred to: "In the changing condition of our cities and villages, it must often happen, as it did actually happen in this case, that edifices of different dimensions, and an entirely different character, would be required. And it might happen, too, that the views of one of the proprietors, as to the value and extent of the new buildings, would essentially differ from those of the other, and the division wall, which would suit one of them, would be inapplicable to the objects of the other." The reasons thus given are particularly applicable to conditions in our own state, and we believe the rule adopted in these cases is sound, and should be followed.

2. In this case the written contract provides: "And in the event of the falling or breaking down of said wall at any time, and in the event that a wall should be rebuilt where the present wall stands, then said Gifford shall have the right to join said wall, and it shall become a party wall as is the one for which this contract is made." This presents the question whether the plaintiff in purchasing said property was chargeable with notice of the terms and conditions of this contract. There is no dispute as to the facts. There is no evidence to overcome the assertion of the plaintiff that he had no knowledge of the existence of any written contract. On the other hand, it is equally clear that the plaintiff knew of the use made by defendant's grantor before the fire of the wall in question. We think it may be conceded that notice to the plaintiff that the defendant's grantor used a portion of such wall for the support of his building charged the plaintiff with knowledge of the existence of an easement in the wall to that extent; but we doubt the soundness and justice of the doctrine that he was thereby

put upon inquiry. It is the policy of the law to require parties claiming interests in real estate by virtue of written instruments to record the same, and thereby give notice of the extent and character of their claim. The place to inquire concerning titles or interests in the titles of real estate is the office of the register of deeds for the county in which the same is situated. If it is demanded of a party purchasing real estate to make inquiry elsewhere, it should be clearly pointed out from whom and where he should seek such information. If it be said that in this case the plaintiff should have inquired of the owner of the adjoining property, the records disclose such owner to be a nonresident of the state, and therefore not easy of access. But, waiving that objection, the rule that requires the intending purchaser to make inquiry must assume that the person inquired of would not only be able to, but would be disposed to, give accurate and reliable information concerning the contents of the instrument in question. A person claiming an interest in realty by virtue of a written instrument can give notice to all the world of the extent of his claim by the registry of such instrument. Intending purchasers are entitled to notice given in this manner, and should not be bound to inquire for or accept the statements of a person who refuses or neglects to record the written instrument under which he claims. When the plaintiff purchased this property neither the defendant nor his grantor was making any actual use of the easement which they claimed in said wall. The only easement of the use of which the plaintiff had any notice was such as would, as we have seen, be terminated by the destruction of the buildings by fire, and it had not been exercised since the occurrence of the fire. It is plain that the actual use of an easement which is relied upon to take the place of the registration of the contract under which it is claimed must be an existing and continuous use. In any view of the case, we do not think the plaintiff was chargeable

with notice of that clause in the contract which it is contended takes it out of the usual rule that an easement ends with the destruction of the property by fire.

3. The judgment of the district court being a proper one upon the grounds we have hereinbefore stated, it becomes unnecessary to inquire whether the last two findings of the court were sustained by the evidence or were within the issues made by the pleadings.

The proper result was reached, and we recommend that the judgment of the district court be affirmed.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. SEVERAL PARCELS OF LAND.
AUGUST C. DAVIDSON, APPELLANT, V. PARKWAY REAL ESTATE COMPANY, APPELLEE.

FILED MAY 21, 1908. No. 15,235.

1. **Taxation**: DECREE: CORRECTION ON CONFIRMATION. Where taxes which are void and illegal are included in a default decree rendered under the provisions of art. IX, ch. 77, Comp. St. 1907, commonly known as the "Scavenger Law," and the attention of the court is called thereto by suitable objections to a motion to confirm, such motion should be denied, and the error in the decree corrected.
2. ———: GROUNDS FOR RELIEF. A proceeding which deprives a person of his property by means of a void tax is gross injustice within the meaning of subdivision 5, sec. 39, art. IX, ch. 77, Comp. St. 1907.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

H. P. Leavitt, for appellant.

D. C. Patterson and *Harry E. Burnam, contra.*

Charles Battelle, amicus curiæ.

CALKINS, C.

This is an appeal from a judgment of the district court for Douglas county refusing to confirm a sale of a tract of land included in an action brought by the county treasurer under the provisions of section 39, art. IX, ch. 77, Comp. St. 1907, commonly known as the "Scavenger Law." On the 21st day of September, 1904, a default decree was entered against the land in question, which was ordered to be sold to satisfy the amount of taxes and assessments shown on the record against it. The same having been sold to the appellant Davidson, a motion to confirm the sale was filed on the 2d day of March, 1907. The owner of the land on the 24th day of May following filed objections to such confirmation, alleging that the decree against the land in question included void and illegal taxes. Upon the hearing of the motion to confirm the sale and objections filed thereto, the district court, finding that certain of the taxes included in the decree were void, sustained the objections, denied the motion to confirm, and vacated the sale; and, from this judgment, the purchaser appeals.

1. It is conceded that a portion of the taxes included in the decree were void and illegal, and that, if the facts presented in the objections to the confirmation had been pleaded in answer in due season, and before the entry of the default decree, such objections would have been fatal thereto. It is, however, insisted that it is too late to urge these objections in opposition to the confirmation of sale. Section 8 of the act in question provides that the petition shall be deemed and taken to be *prima facie* evidence of the legality of all the taxes and assessments set forth therein, and shall be construed as in evidence on behalf of the state without a formal offer. It is further provided by section 11 that, in all cases where the taxes and assessments set forth in the petition have not been

paid on any tract of land or lot on or before the 15th day of September next following the filing of the petition, and where no answer has been filed within the time limited, it shall be the duty of the judge of the district court to enter a decree in favor of the state and against all the descriptions of real estate standing in default, such decree to be for the full amount of the taxes and assessments, with interest from the 1st day of October of the current year, as set forth in the petition. Sections 38 and 39 of the same act provide: Section 38. "It shall be the duty of the holder of each certificate of tax sale (or other than the state, county, or city), on or before the last day of the redemption period, either by himself or by his agent or attorney, to enter in said confirmation record the date of such decree, as well as the number of the tract covered by his certificate of tax sale, together with a description of the real estate on which confirmation is sought and the time when and the place where a hearing will be had upon such confirmation." The entry of notice in such confirmation record shall be deemed equivalent to personal service upon all persons served with final notice. The order of confirmation may be entered by a judge of the district court sitting at chambers. The court shall examine the record of the proceedings and if such proceedings are found to be regular and the notice of the expiration of the time of redemption has been duly served and notice given of the hearing on confirmation, and if it shall appear that the person applying for confirmation is entitled to a deed to the property, an order of confirmation shall be entered directing the treasurer of the county to execute and deliver to the owner of the certificate a deed of the real estate sold in due form of law. Any person having an interest in the real estate upon which a sale is about to be confirmed may, at any time prior to confirmation, file with the clerk of the district court his objections thereto in writing, and shall at the same time enter notice thereof in the confirmation record. The party so objecting shall state the nature of

his interest in the property and shall describe such property by reference to the petition number of the tract, and shall also state in concise language the facts on which he bases his objections."

Section 39. "Confirmation of sale shall not be withheld, nor shall the sale be set aside except on one or more of the following grounds: First. That the court was without jurisdiction to enter the decree. Second. That the taxes or assessments on which the decree was based had been paid prior to the decree, or sale. Third. That redemption had been made from the decree or treasurer's sale thereunder. Fourth. That the land was not subject to taxation or to special assessment. Fifth. That the taxes and assessments, or a part thereof, were based upon proceedings wherein there had been fraud, gross injustice or mistake."

In the case of *State v. Several Parcels of Land,* 75 Neb. 538, the question before this court was the right of an owner to open the default decree in this suit and defend the action because she had not had notice of the commencement or pendency of the suit, and the court held that "the provisions of the statute granting the land owner the right to object to the confirmation of sale, and defining the grounds of objection, afford him an opportunity to have the question of the validity of the tax determined before he is deprived of his property, but he may be required to wait until confirmation is applied for to litigate that question," and refused to open the default upon the ground that the question of the validity of the taxes might be determined upon the application to confirm the sale. The correctness of this decision is assailed, and that part quoted by us is attacked as being *obiter dictum.* We are asked to place an entirely different construction upon sections 38 and 39, *supra.* The state of Illinois enacted a scavenger law at an early day, and several other states have adopted similar legislation. Our own statute seems to have been largely taken from that of Minnesota; but as the Minnesota statute contains no

provision for confirmation of sales the construction placed upon it can be of no assistance to us, except as indicating how our statute should be construed had the provisions contained in sections 38 and 39 been omitted therefrom. It is probable that these sections were adopted in order to give the owner the rights in this proceeding which are secured to him in administrative sales for taxes by section 3, art. IX of the constitution.

It is urged that the proceedings prescribed by the statute are judicial in their nature, and that the decree rendered in pursuance of section 11, *supra,* is final and conclusive, and that it is inconsistent with this view to say that such decree may be opened up or assailed on confirmation. It is a canon of construction that an interpretation which gives effect to all parts of the statute should be sought for, and, if possible, adopted. In this case all that is urged on behalf of the conclusive character of the decree might be admitted when such decree is attacked in another action or after confirmation, and at the same time effect might be given to the provisions of section 39. To maintain the conclusive character of the decree, it is not necessary that we should hold that it may not be modified or corrected before the sale is finally confirmed. The decree of a court in an ordinary action is within the control of the judge during the term at which it is rendered, so that he may set it aside at his discretion, and this without any statute; but this power does not impair the conclusive character of the decree. It is certainly competent for the legislature to extend this power or impose upon the court the duty of correcting errors up to the time the case is finally disposed of. This it seems to have done by the provisions contained in section 39. The provisions are plain and unambiguous that a sale should not be confirmed in the five enumerated cases mentioned in section 39.

But it is argued that the provision in section 38, that the court shall examine the record of the proceedings limits the power of the court to consider any fact not

appearing in the record of the case. The paragraph under which this contention is made reads: "The court shall examine the record of the proceedings and if such proceedings are found to be regular and the notice of the expiration of the time of redemption has been duly served and notice given of the hearing on confirmation, and if it shall appear that the person applying for confirmation is entitled to a deed to the property, an order of confirmation shall be entered directing the treasurer of the county to execute and deliver to the owner of the certificate a deed of the real estate sold in due form of law." It will be observed that this contains no provision for a hearing upon objections to be made by the owner. That is contained in the remaining paragraph of section 38 and in section 39. It might well be contended that the paragraph above quoted is intended to regulate the proceedings when no objection to confirmation is made, while the last paragraph of section 38 and section 39 prescribe what shall be done when objections are filed. However, we think the contention that confirmation of the sale shall not be denied nor the sale set aside except for facts appearing upon the record of the proceedings is to be tested by considering whether the grounds mentioned in section 39 are such as necessarily or probably would appear upon the record if they in fact existed. The first ground, that the court is without jurisdiction, may or may not appear by the record. The second ground, that the taxes and assessments on which the decree was based had been paid prior to the decree, would not naturally appear upon the record; for, if the fact of such payment had appeared upon the record the land would not have been included in the petition. The third ground, that redemption has been made from the decree or treasurer's sale, might or might not appear upon the record; but the necessity for raising this objection to confirmation could only arise in those cases where it did not so appear. The fourth ground, that the land was not subject to taxation or to special assessment, could not well appear upon the record of the proceedings;

while the fifth ground, that the taxes and assessments, or a part thereof, were based upon proceedings wherein there had been fraud, gross injustice or mistake, could not appear upon the record of the proceedings in any case which we are able to imagine. To hold that the use of the words "record of the proceedings" in section 38 precludes the court from the examination of any facts not apparent therefrom would not only be extremely technical and narrow, but would violate the principle of construction that all the provisions of a statute are to be given effect if possible, and practically work a repeal of most of the provisions of section 39. No sufficient reason is presented for a departure from our ruling in *State v. Several Parcels of Land, supra,* and we therefore adhere to the same.

2. It is contended that a void tax is not necessarily an unjust tax. In other words, we are asked to give to the word "just" its popular meaning of upright, honest, impartial, fair and equitable, rather than its legal interpretation of true, exact and conformable to law. If we were permitted to give this word the popular interpretation, we might go behind the acts of the legislature in authorizing the tax, and the acts of administrative officers imposing it; for, in the popular sense of the word, laws are sometimes unjust, and taxes imposed in pursuance thereof often oppressive. In that sense of the word it may be broadly stated that any unnecessary tax is an unjust tax. If we were to adopt that definition, we might inquire into the need for the tax, and into the motives of officers imposing the same. Such a construction would lead us into a world of uncertainty and conjecture. In determining what is just, the judicial branch of the government should not be permitted to question that mass of principles, which, classified and reduced to order by the legislative power and the interpretation of the courts, we call "the law." It is the very essence of the social compact that we should be governed by those principles of justice which are crystallized into law; and in its admin-

istration nothing can be said to be just which is unlawful, and nothing unjust that is lawful. The interpretation put upon the statute in question in *Wead v. City of Omaha,* 73 Neb. 321, and *State v. Several Parcels of Land, supra,* should be adhered to; and it follows that where void or illegal taxes have been included in the decree, and the attention of the court is called thereto by suitable objections to the motion to confirm, such motion should be denied, and the error in the decree corrected.

We therefore recommend that the judgment of the district court be affirmed.

AMES, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY CONNETT, APPELLANT, V. ERNEST P. CONNETT, APPELLEE.

FILED MAY 21, 1908. No. 15,081.

1. **Divorce: MAINTENANCE OF CHILDREN: DECREE: ALTERATION.** Where, in a decree of divorce, the court includes an order concerning the custody or maintenance of minor children, those infants in a sense become wards of that court, and it has authority at any subsequent period of their minority, upon application of either parent and sufficient notice to the other, to revise and alter the decree so far as it relates to the care, custody or maintenance of the children.

2. ———: ———. The parents cannot by contract between themselves, nor can the court by any order it may make in the divorce suit, irrevocably determine the amount of money the father shall contribute for the support and education of his children, so as to deprive that court of power, upon a proper showing and notice, to alter said decree in the interest of justice and for the benefit of said children.

3. ———: DECREE. The wife's alimony and the children's maintenance, if included in the same decree, should be separated into distinct items, and not included in one sum.

APPEAL from the district court for Seward county: ARTHUR J. EVANS, JUDGE. *Reversed with directions.*

Landis & Schick and *Ray J. Abbott,* for appellant.

Norval Bros. and *J. J. Thomas, contra.*

ROOT, C.

In 1902 plaintiff was divorced from defendant by decree of the district court for Seward county. Her original petition charged cruelty and adultery; but on the evening of the first day of the trial of said cause the litigants stipulated in writing that plaintiff would file an amended petition charging only a wanton failure to support her, that an absolute divorce should be granted, plaintiff to have the custody of their two children, eight and eleven years of age, respectively, and that defendant would pay as alimony to the wife and maintenance for the children $10 each month for seven years, and furnish the children clothing, "if such provision for that term is necessary," and so long as plaintiff remained unmarried defendant for five years would provide her with a dwelling, and she to retain all their household furniture, the $10 a month to be in lieu of dower and all other claims and demands of plaintiff against defendant. The court acted on the stipulation, and the evidence theretofore taken, and granted a decree upon the amended petition in strict conformity with the terms of the stipulation, and further ordered the reporter not to transcribe his shorthand notes of said testimony for any one. In 1904 plaintiff commenced these proceedings for a modification of said decree and an increase of the allowance therein provided for, because of the alleged fraud in procuring said stipulation and the judgment thereon, her changed circumstances on account of failure of health, the increased cost of living, the insufficiency of the allowance to maintain and educate the children, the failure of defendant to provide clothing for the children, and for other reasons

not material, as we view the record. The district court dismissed the petition, and plaintiff appeals.

1. The charge of fraud is very indefinite and totally unsustained by the evidence. It is more than likely that the real reasons for the settlement and the unusual action of the court in seeming to be controlled by the stipulation of the parties do not appear in the record in this case.

2. So far as plaintiff is concerned, we are of opinion that her showing of impaired health will not warrant a modification of the decree for the purpose of increasing her alimony. It is not necessary to, nor do we, determine the defense of *res judicata* interposed to her personal demand. We do, however, reject that defense so far as it affects the children. The care, custody and maintenance of the litigants' children were considered by the court in the action for divorce. Section 5338, Ann. St. 1907, provides that the court upon pronouncing a decree of nullity or of divorce, either from the bonds of matrimony or from bed and board, may make such further decree as may be just and proper for the care, custody and maintenance of the minor children. The succeeding section provides: "The court may from time to time, afterwards, on the petition of either of the parents, revise and alter such decree concerning the care, custody and maintenance of the children, or any of them, and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children shall require." In case the court has acted under section 5338, *supra,* the child becomes in a sense the ward of that court, and to the extent that the decree affects the infant it may be modified or changed by the court at any time during the child's minority. *Miner v. Miner,* 11 Ill. *43; *Hoffman v. Hoffman,* 15 Ohio St., 427; *Buckminster v. Buckminster,* 38 Vt. 248, 88 Am. Dec. 652; *Miles v. Miles,* 65 Kan. 676.

The stipulation between the parents will not avail to release defendant from his lawful obligation to sup-

port, maintain and educate his children. A bargain, with the possible consideration that the parent's peccadilloes shall not be aired in public, or that the mother may be furnished long withheld and sorely needed funds for her support, will not be considered in adjusting the rights of infants not parties to the arrangement and incapable of assenting thereto. Defendant's duty to his offspring and his liability for their support and education continued as imperative after as before the divorce. *Chambers v. Chambers,* 75 Neb. 850; *Spencer v. Spencer,* 97 Minn. 56, 114 Am. St. Rep. 695; *McAllen v. McAllen,* 97 Minn. 76. To secure the payments of $10 a month, plaintiff was compelled to release all claims she might have against her husband or his estate. Defendant being the wrongdoer, plaintiff was entitled to alimony, in the discretion of the court, based upon defendant's probable future earnings, as well as upon his property, real and personal. *Cole v. Cole,* 142 Ill. 19, 34 Am. St. Rep. 56. No one can ascertain from an inspection of the decree whether any part of the allowance, other than the household furniture, was made as alimony for plaintiff, or whether it was all intended as maintenance for the children.

Defendant has paid $10 a month to plaintiff, and has also provided the children with a generous supply of wearing apparel, besides giving each of them spending money from time to time. Plaintiff has also purchased some minor articles each year for her children. Plaintiff testified, and she is not contradicted, that the necessaries of life cost more than they did in 1902, and that it will cost $32 a month to support the children as they have been accustomed to be maintained. The affidavits on file in this court in support of and resisting plaintiff's application for suit money disclose that defendant has changed his residence to Kansas and that the boy is now with the father. The mother testifies that the boy went to his father without her permission and against her will. The son is old enough and sufficiently well developed to earn money to aid his mother; but he evidently prefers the

father's society and plethoric purse to the mother's home and meager resources. It is undisputed that the father is a successful business man, making in some instances as much as $200 a week; but he has not seen fit to disclose to the court the extent or value of his property, as he might well have done. The decree should have been explicit, separating the allowance of alimony for the mother from the maintenance for the children; and, as it only obligates the father to furnish clothing when "necessary," it is indefinite and open to differing construction by the parties interested. Doubtless the learned district judge considered that he was constrained to follow the form of the stipulation; else this condition would not exist.

Winnie, the girl, will not attain 18 years of age till the spring of 1912, the exact date not being furnished, and there is no good reason why her father should not support her until her eighteenth birthday. In our opinion, the judgment of the district court should be reversed and the cause remanded, with directions to said court to modify its former decree, so that plaintiff recover from defendant the sum of $30 a month for each and every month, commencing April 15, 1908, and ending March 15, 1912, for the support and education of their said children, without deduction for the absence of the son, Walter, from plaintiff's home, and that she be not compelled to maintain him elsewhere; that the provision in the original decree for clothing be annulled, that the said sum of $30 a month be in lieu of all allowances under said decree, and that it be paid to the clerk of the district court for plaintiff; that defendant pay the costs of these proceedings, including an attorney fee of $75 for plaintiff's attorneys.

FAWCETT, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to said court to modify its former decree, so that plaintiff recover from

defendant the sum of $30 a month for each and every month, commencing April 15, 1908, and ending March 15, 1912, for the support and education of their said children, without deduction for the absence of their son, Walter, from plaintiff's home, and that she be not compelled to maintain him elsewhere; that the said sum of $30 a month be in lieu of all allowances under said decree monthly in advance, and that it be paid to the clerk of the district court for plaintiff; that defendant pay the the costs of these proceedings, including an attorney fee of $75 for plaintiff's attorneys.

JUDGMENT ACCORDINGLY.

PENNINGTON COUNTY BANK, APPELLANT, V. ANTON BAUMAN, JR., SHERIFF, APPELLEE.

FILED MAY 21, 1908. No. 15,195.

1. **Chattel Mortgages:** ACTION BY MORTGAGEE. A mortgagee of chattels cannot maintain a possessory action against a stranger unless, as between mortgagor and mortgagee, the latter has the right of possession. *Camp v. Pollock*, 45 Neb. 771, followed and approved.

2. **Pleading.** A plaintiff in replevin, claiming under a chattel mortgage, must allege in his petition the facts creating his interest, and those entitling him to possession of the chattels. *Camp v. Pollock*, 45 Neb. 771, followed and approved.

3. **Appeal.** An instruction given by the court, but not excepted to by a litigant, will not be reviewed in this court on that litigant's complaint.

4. ———. Alleged errors of the trial court in an action at law, not referred to in the motion for a new trial, will not be considered in this court.

5. **New Trial.** In a replevin action, the court at the close of the evidence directed a verdict for defendant, submitting to the jury but one question, to wit, the amount of defendant's recovery. Counsel for plaintiff did not ask permission to withdraw a juror, or request a continuance of the case, and was given permission to make such amendment to his petition as he desired. He

later participated in the argument to the jury, and at no time before the verdict was returned indicated to the court that he was surprised. *Held*, That the court properly denied a new trial on the alleged grounds of accident and surprise.

APPEAL from the district court for Dodge county: JAMES G. REEDER, JUDGE. *Affirmed.*

Frank Dolezal, for appellant.

Courtright & Sidner, contra.

ROOT, C.

There is but little conflict in the evidence in this case. One Sigman formerly resided in Nebraska, and became indebted to the Dodge County Bank, a domestic corporation, transacting business at Fremont. Sigman thereafter moved to Pennington county, South Dakota, and engaged in rearing and buying and selling horses. He borrowed $3,000 from plaintiff, and gave it a mortgage upon all his horses and mules as security for the debt. Thereafter, with plaintiff's knowledge, Sigman loaded the horses and mules in controversy into a car at Rapid City, South Dakota, and consigned them to himself at Long Island, New York. Defendant, the sheriff of Dodge county, attached the stock in the car in the railway yards in Fremont. The writ was issued in an action brought on Sigman's note to the Dodge County Bank, and personal service of summons was made upon Sigman, who accompanied the stock as a caretaker. Plaintiff replevied. At the close of the evidence the court instructed the jury to bring in a verdict for defendant, which was done, and plaintiff appeals.

1. Surprise and accident in the trial of the case and alleged misconduct of the district court preventing a fair trial are urged as grounds for a new trail, for the alleged reason that the court at the commencement of the trial overruled an objection to the introduction of any evidence, but at the close thereof instructed a verdict for defendant. Counsel says that he was lulled into a belief

that his petition was good, else he would have amended it. Counsel did ask for permission to amend his petition by striking therefrom a part thereof, not by adding thereto, which request was granted. Counsel did not ask to withdraw a juror, nor, so far as the record discloses, in any manner indicate his surprise, but, on the contrary, submitted requests for instructions and made an argument to the jury upon the issue of the value of the stock taken under the writ. The court did not abuse its discretion in refusing a new trial on the ground of accident or surprise, nor is there the slightest justification for charging the trial judge with misconduct. *Matoushek v. Dutcher,* 67 Neb. 627.

2. In the state of the record it is difficult to determine the reasons for the peremptory instruction; whether upon the insufficiency of the petition, or because the evidence did not establish a cause of action in plaintiff's favor. Counsel for defendant urge that the petition and the evidence are both deficient. The evidence tended to establish the existence of a chattel mortgage for $3,000 given by Sigman to plaintiff for a *bona fide* debt, duly recorded in the office of the registrar of deeds of the county where the property was then situated and where the mortgagor and mortgagee resided. The South Dakota laws were not pleaded, and we must assume that they are identical with our statutes on the subject of chattel mortgages. It is argued that filing a mortgage with the registrar of deeds does not comply with the law. In counties having less than 18,000 inhabitants the county clerk is *ex officio* registrar of deeds. The mortgage seems to have been recorded in a chattel mortgage record, and, without the aid of more direct evidence, we are inclined to the view that the proof tended to prove not only a valid mortgage, but one filed in compliance with the laws of Nebraska. The petition, under the repeated decisions of this court, did not state a cause of action in favor of plaintiff. It affirmatively disclosed that plaintiff was a mortgagee of the chattels, and that the debt secured

thereby was neither due nor paid, but it did not state any condition or fact entitling plaintiff to the possession of the property, and would not have supported a judgment in its favor. *Musser & Co. v. King,* 40 Neb. 892; *Camp v. Pollock,* 45 Neb. 771; *Hudelson v. First Nat. Bank,* 51 Neb. 557; *Thompson & Sons Mfg. Co. v. Nicholls,* 52 Neb. 312. We therefore assume it was the insufficiency of the petition, and not the paucity of the evidence, that influenced the court in directing the verdict.

3. Counsel urge that the court should have instructed the jury to return a verdict for the value merely of Sigman's interest in the property, and that it erred in directing them to find defendant's interest as the market value of the property at the time of seizure, plus 7 per cent. annual interest from that date. The obstacles to our consideration of this complaint are that plaintiff did not except to one instruction of the court fixing the measure of defendant's damages; neither did its counsel tender an instruction on his theory of the law on that subject; nor in his motion for a new trial did he assert that the proper measure of damages was not given in the court's instructions or specifically refer to the instruction he now complains about; neither has he in his assignments of error filed in this court referred to said instructions. In short, the record is in that condition that we cannot, without violating long-established and well-known rules of practice, consider or pass upon the alleged error in instructing the jury as to the measure of damages. *Wells, Fargo & Co. v. Preston,* 3 Neb. 444; *Scofield v. Brown,* 7 Neb. 221; *Levi v. Fred,* 38 Neb. 564; *Bouvier v. Stricklett,* 40 Neb. 792; *Barr v. City of Omaha,* 42 Neb. 341; *Green v. Tierney,* 62 Neb. 562.

For the reason that the petition did not state facts sufficient to constitute a cause of action in plaintiff's favor, we recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SAMUEL MANCUSO, APPELLANT, V. CHARLES ROSSO, APPELLEE.

FILED MAY 21, 1908. No. 15,210.

1. **Partnership:** EVIDENCE. A verbal agreement between two persons to purchase jointly a city lot, where one of said parties later buys the land, paying all the purchase price and taking the entire title in himself, does not constitute a partnership. *Norton v. Brink*, 75 Neb. 575, followed.
2. **Statute of Frauds:** AGREEMENT AS TO LANDS. Unless there has been such a performance of said contract as to take it without the statute of frauds, the agreement will not be specifically enforced.
3. ———: PART PERFORMANCE. The mere writing of two letters to the former owner by one of said parties to ascertain the lowest price for which said property can be bought, which letters refer to the writer as the sole prospective purchaser, and the inspection of said premises to determine the repairs essential to restore the building thereon to a habitable condition, will not constitute such a part performance as to take the contract without the statute of frauds.
4. **Specific Performance:** DECREE. In an action for specific performance of a contract, where the answer is a general denial, it is error for the court to quiet defendant's title against plaintiff's claim to the property involved.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Judgment modified.*

T. W. Blackburn, for appellant.

Baldrige & De Bord, contra.

ROOT, C.

Plaintiff prays for a specific performance of an alleged oral contract between himself and defendant whereby

they agreed to purchase "as partners" lot 8, in block 196, in the city of Omaha, for an accounting of rents and profits, or for damages for the violation of said contract. Plaintiff is engaged in the real estate business, and defendant is a merchant, both residing in Omaha. The parties in January and February, 1906, considered purchasing from an insurance company the property herein involved. The latter part of February defendant bought the lot for himself, dealing with a broker, Robinson, and the vice-president of the company. Plaintiff had twice written said company to learn the best terms upon which the property could be bought. No writings passed between the parties hereto, nor did either one sign any memorandum in writing to evidence their transactions, nor did plaintiff contribute to the purchase price of the property. The court found that the parties had orally agreed with each other to purchase the property on their joint account, but not as partners, that the agreement was within the statute of frauds and void, dismissed the petition, and quieted defendant's title. Plaintiff appeals.

1. The evidence fully supports the court's finding that Mancuso and Rosso were not partners, but it requires liberality to say that the record sustains the finding that there was an agreement between the parties to purchase on a joint account. There is considerable evidence in the record tending to show a lack of good faith on the part of each to the other in the transaction, but not to uphold a finding of fact, or to warrant an inference of law that Rosso sustained a fiduciary relation toward Mancuso, or that he represented any one other than himself in purchasing the lot. The case at bar comes well within the rule in *Norton v. Brink*, 75 Neb. 575. Plaintiff asserts that *Johnson v. Hayward*, 74 Neb. 157, controls the instant case, but it will be observed that the defendant in the cited case was plaintiff's agent, specifically charged with the duty of purchasing the land for his principal, and for the abuse of that confidential relation, and in vindication of the rule that holds the agent strictly account-

able to his principal for all acts done within the scope of his employment, we affirmed the judgment of the district court impressing a trust upon the real estate. In the case at bar the relation of the parties to each other did not create either the agent of the other, nor did Rosso agree or promise, nor was he employed by Mancuso, to purchase the lot or any part thereof for the benefit of plaintiff. Neither does *Rice v. Parrott,* 76 Neb. 505, cited by plaintiff, aid him, because that was an action for an accounting of the profits of a partnership formed for the purpose of purchasing and selling lands, and defendant had admitted in writing that plaintiff was entitled to the profits for which the suit was instituted. Nor can it be said with any regard for the record that the statute of frauds, if interposed, will work a fraud upon plaintiff. Plaintiff did nothing more in pursuance of the alleged contract than to write two letters to the insurance company to secure the lot for himself, and to inspect the building with the building inspector, and later with defendant, to ascertain the repairs necessary to place the property in a habitable condition. Defendant fully explains his reasons for examining the property, and they in no wise relate to any contract between the parties. In speaking of acts or part performance to take a case without the statute of frauds, Vice Chancellor Wigram, in *Dale v. Hamilton,* 5 Hare (Eng.), *369, *381, says: "It is, in general, of the essence of such an act that the court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract," and further says that, if an act admits of an explanation without supposing a contract, it is not in general a sufficient performance. And we have said that trivial acts will not be considered sufficient to take an oral agreement for an interest in lands without the statute. *Poland v. O'Connor,* 1 Neb. 50; *Hunt v. Lipp,* 30 Neb. 469. Nothing that Mancuso did, as shown by the record, takes his con-

tract, if any was made, without the statute of frauds. His case does not come within any of the exceptions referred to in any of our former decisions, and on the authority of *Norton v. Brink, supra,* defendant must prevail. *Dunphy v. Ryan,* 116 U. S. 491; *Fickett v. Durham,* 109 Mass. 419; *Parsons v. Phelan,* 134 Mass. 109; *Roughton v. Rawlings,* 88 Ga. 819; *Morton v. Nelson,* 145 Ill. 586; *Schultz v. Waldons,* 60 N. J. Eq. 71.

2. The court not only dismissed the petition, but quieted defendant's title to said property against plaintiff and his claims. Defendant's answer was in effect a general denial; nor did he ask for general or equitable relief, merely that plaintiff's petition be dismissed with costs. The pleadings therefore do not support so much of the judgment as quiets defendant's title to said property.

It is therefore recommended that the judgment be modified by vacating the part thereof quieting defendant's title; that in all other things it be affirmed; and that plaintiff pay the costs of the district court, and defendant those of this court.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is modified by vacating the part thereof quieting defendant's title, and in all other things it is affirmed; plaintiff to pay the costs of the district court, and defendant those in this court.

JUDGMENT MODIFIED.

THADDEUS D. PERRINE, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED MAY 21, 1908. No. 15,217.

1. **Negligence.** A stock yards company that, for a compensation, furnishes facilities for the receipt and sale of live stock, and retains control over and repairs the pavement in the alleys in and around its yards, and negligently permits said pavement to become and remain out of repair, is liable to a salesman, who, by virtue of his employment by a commission firm, has the right to use said alleys, where, by reason of said defects, his horse stumbles and falls, and the rider is injured thereby, he being at said time in the discharge of his duties as a salesman, and in the exercise of such care as a prudent person ordinarily would practice in view of the danger, and the said defect having existed for that length of time that the said company ought, with the exercise of reasonable diligence, to have known thereof.

2. **Trial:** INSTRUCTIONS. It is not error to refuse instructions, the substance whereof has been included in instructions given by the court.

3. ———: QUESTIONS FOR JURY. Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Greene, Breckenridge & Matters, for appellant.

Lambert & Winters, contra.

ROOT, C.

Defendant owns and maintains extensive stock yards in the city of South Omaha. It leases office rooms in its exchange building to commission men, and those tenants, as an incident to said lease, are given the use of pens for the receipt and detention of live stock consigned to them; defendant reserving the right to use the pens whenever it may desire. The alleys between the pens are paved, some with

plank, and others with brick or cement, and are used in handling stock, and by commission men and their employees, and the owners and purchasers of stock, and are kept in repair by defendant. Salesmen and buyers generally ride to and fro on horseback in and about the pens and yards. Plaintiff was employed as a salesman for a commission firm, and had been engaged in that business around said yards for one firm or another for some 17 years preceding the accident. An alley, running north and south, and paved with plank divided the block of pens wherein plaintiff's employers received and retained stock. It was 16 feet in width, with gates about 12 feet from either end, so constructed that the alleyway might be completely closed, and between those gates smaller ones gave access to the pens on either side of the way. At the time of the accident plaintiff was piloting a prospective purchaser of stock to said pens. He was riding along the north side of the block, and turned into the alley at the northeast corner thereof to go south. The gate, which was hinged to a post on the west side of the alley, was about one-third open, and as plaintiff's horse turned south, close to the east side of the alley, it either stumbled or slipped, at a point about 4 feet north of the gate, and 8 feet south of the northern exit of the alley, and, failing to recover its footing, fell, severely injuring plaintiff. The evidence tended to prove that a hole in the pavement, some 6 inches wide and deep, and from 12 to 24 inches in length, had existed for some 6 weeks at the point where the horse stumbled or slipped, and that the horse stepped therein. The horse was furnished plaintiff by his employers, and had been used by him about 18 months. The evidence tended to prove that the animal was awkward, and unsuited for riding, and that it was smooth shod at the time of the accident. Plaintiff recovered a verdict, and defendant appeals.

1. It is not claimed that the verdict was excessive, but defendant insists that the issue of its liability was not properly submitted to the jury, and that the court should have instructed the jury to bring in a verdict for it. Coun-

sel very succinctly sum up their argument: "But in this case of an invitee while engaged in his own business, as was plaintiff in this suit, the obligation of the owner of the premises to exercise reasonable care to maintain them in a reasonably safe condition hinges upon the conduct of the user; and there is no obligation in such a case as this to do more than to refrain from wanton and aggressive injury, except toward persons who are themselves in the exercise of ordinary care in the use of the premises." Complaint is also made that the court did not specifically direct the jury's attention to the character of the horse and and the condition of its shoes. The trial judge's instructions are involved, and might have been condensed, but they evidence his desire to present every phase of the evidence and law, and to give defendant the benefit of all of its defenses. The jury were instructed that the burden of proof was on plaintiff to prove the material allegations in his petition; that if ordinary care and prudence dictated that said horse should be sharply shod, or handled otherwise than plaintiff controlled it, and said facts were the proximate or a contributing cause of the injury, plaintiff could not recover. In the seventh instruction the jury are instructed that, before considering defendant's alleged negligence, they must ascertain whether "plaintiff was exercising reasonable care and prudence for his own safety," and, further, if they found from all the facts and circumstances, as shown by the evidence, that plaintiff's acts did not, but that defendants' negligence, as alleged, did, proximately cause the injury, that defendant would be liable; that they should take into consideration plaintiff's knowledge of the conditions in the yards, and that "the law requires the plaintiff to make that use of his senses as a man of ordinary prudence would have made under the circumstances." In the eighth instruction the judge said that defendant was charged with the duty of reasonable and ordinary care in keeping and maintaining its alleys and passageways in such a reasonably suitable and safe condition for travel as was consistent with the purposes for

which they were used, and that slippery conditions, caused by rains, drainage or the excretions of animals, would not render defendant liable; that in the matter of repairs defendant would not be liable for holes in the plank pavements until it had actual knowledge thereof, or the defect had existed for such a length of time that it ought reasonably to have had such knowledge. Time and again the court cautioned the jury that if plaintiff was negligent or careless he could not recover; that he "must exercise in his own behalf such reasonable care and prudence and caution as reasonable and prudent men ordinarily exercise in their own behalf under like conditions." The substance of defendant's requests, numbered 2 and 3, were included in the court's own instructions, and it did not err in failing to employ the exact language used by defendant. *Langdon v. Wintersteen,* 58 Neb. 278. Defendant retained control over and repaired the alley in question. Plaintiff's employers paid a consideration for the use thereof by themselves and their employees. Plaintiff, in common with others having business in that part of the stock yards, was invited by defendant to use the alley, and it knew that salesmen and buyers generally rode horseback along this and the other ways in said yards, and it was bound to exercise reasonable care to maintain said passageway in a reasonably safe condition for the uses it invited others to make thereof. *Campbell v. Portland Sugar Co.,* 62 Me. 552, 16 Am. Rep. 503; *Looney v. McLean,* 129 Mass. 33, 37 Am. Rep. 295; *Kirby v. Boylston Market Ass'n,* 14 Gray (Mass.), 249, 74 Am. Dec. 682; *Coupe v. Platt,* 172 Mass. 458, 70 Am. St. Rep. 293; *Nash v. Minneapolis Mill Co.,* 24 Minn. 501, 31 Am. Rep. 349; *Siggins v. McGill,* 72 N. J. Law, 263, 111 Am. St. Rep. 666; *Sawyer v. McGillicuddy,* 81 Me. 318, 3 L. R. A. 458; *La Plante v. La Zear,* 31 Ind. App. 433; *Shoninger Co. v. Mann,* 219 Ill. 242.

2. We are of opinion that plaintiff was entitled to submit his case to the jury. The authorities cited by defendant refer to instances where the danger was obvious, as where the injured person jumped from a moving train, or thrust

his head into an elevator shaft and was struck by descending weights or the car, or drove onto a railway crossing without looking for approaching cars, or attempted to pass between the cars of a freight train, or carelessly walked upon a railway. *Knight v. Baltimore City,* 97 Md. 647, is the nearest in point, but it may be distinguished. In the cited case a teamster was thrown from his wagon by reason of the front wheel dropping into a hole in the pavement while he was idly chatting with a friend on the wagon. The teamster knew that the street generally was very defective, and the hole that brought him to grief could be seen at least a block distant. In the instant case the defect was not an obstruction, nor an extensive hole plain to be seen at a distance, and, during its four or six weeks' history preceding the accident, would frequently be filled with slush and mud. It was to one side of the way, and Hall, defendant's superintendent of repairs, had inspected the alley two weeks preceding the accident, and had not noticed it. Crocker, witness for defendant, testified that he examined the pavement right away after the accident, and did not find a hole therein. Whereas Sullivan, Arnold and Morrill, witnesses for plaintiff, testified that they saw it at the time of the accident, and had seen it at intervals for some four or six weeks prior thereto. Plaintiff testified that he had not noticed the defect before the accident; his mere act of riding into the alley was not dangerous, he had barely rounded the corner of the pen, when his horse stepped into the hole and was thrown. Even if plaintiff had theretofore known of the defect, that knowledge would not of necessity have defeated his recovery. Defendant's negligence, as charged, being otherwise established, the question was whether plaintiff, under all the circumstances, exercised such care as a prudent man ordinarily would have practiced in view of the danger. *Nicholson v. City of South Omaha,* 77 Neb. 710; *Reed v. Inhabitants of Northfield,* 13 Pick. (Mass.) 94, 23 Am. Dec. 662; *Looney v. McLean, supra; Mathews v. City of Cedar Rapids,* 80 Ia. 459, 20 Am. St.

Rep. 436. In the state of the record the issues of negligence and contributory negligence were peculiarly for the consideration of the jury. *Omaha Strect R. Co. v. Loehncisen,* 40 Neb. 38.

We have considered all of the assignments of error filed by defendant, and are of opinion they are not well taken; that it does not have just cause for complaint, and we therefore recommend that the judgment of the district court be affirmed.

CALKINS, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

THOMAS J. SHEIBLEY, APPELLANT, V. FRANKLIN D. FALES, APPELLEE.

FILED MAY 21, 1908. No. 15,365.

1. **Libel and Slander:** WRITING CONSTRUED. Defendant published a written statement that plaintiff had procured perjured statements concerning a candidate for congress and had circulated a base and slanderous attack on said candidate's character; that the animus of said attack originated in a case wherein said candidate had appeared as attorney against plaintiff; that said action was prosecuted by Dixon county to recover fees plaintiff had not accounted for as county clerk, and that ever since the termination of said case he had been active in originating and circulating false and malicious reports attacking the character of said attorney. *Held,* Said article did not directly or by imputation charge plaintiff with embezzlement, perjury or subornation of perjury.

2. ———: PLEADING. The defendant in a civil action against him for libel may, where the alleged libel is specific, answer that the charge is true; but, where the charge is in general terms, the answer must allege the facts upon which he relies to establish the truth of the charge.

3. ———: ———. Generally an answer justifying the publication of

an alleged libel on the ground that the statements made are true is specific enough if it gives the plaintiff sufficient notice of what defendant will attempt to prove.

4. ———: ———. After verdict, an answer in a libel suit, treated by the parties and the trial judge as adequate, will not be held bad.

5. **Trial:** BURDEN OF PROOF. If the publication of a libel actionable *per se* is admitted, and justification pleaded, the burden of the issues is on the defendant, and he has the right to first produce his evidence, and to open and close the arguments.

6. **Appeal:** ARGUMENTS OF COUNSEL: DISCRETION OF COURT. "It is within the discretion of the trial court to limit the time for arguments to the jury, and an order so limiting time presents no question for review, unless it is made to appear that the arguments were thereby unduly restricted, and that the time allotted to the complaining party was consumed." *Dixon v. State*, 46 Neb. 298.

7. **Trial:** INSTRUCTIONS. An instruction is not necessarily prejudicially erroneous because it is obscure, where another instruction on the same point is clear and correct.

8. **Appeal:** INSTRUCTIONS: HARMLESS ERROR. In an action for the publication of an article libelous *per se*, defendant's belief that his said statements are truthful will not be received in mitigation of damages; and an instruction that the jury consider the evidence tending to prove defendant's belief in the truth of his statements as in mitigation of damages is erroneous, but, if the jury find generally for defendant, such an instruction is error without prejudice.

9. **Libel and Slander:** INSTRUCTIONS. If the court in a suit for libel instructs the jury that defendant, in order to justify, must prove the truth of the statements contained in the alleged libel, and that in publishing the same he acted without malice, from good motives and for justifiable ends, it is not error to further instruct the jurors to consider whether defendant had good ground to believe and did believe the statements he made were true.

10. ———: EVIDENCE. The fact that defendant did not personally investigate the truth of the charges made by him against plaintiff will not conclusively establish his liability in a libel suit based on those statements.

11. **Evidence:** JUDICIAL RECORDS. A judicial record, if properly certified, is admissible to prove its own existence.

12. ———: JUDGMENT. A judgment in favor of a county against its clerk for fees improperly retained by him as such officer may

be introduced in evidence in any subsequent action between the judgment defendant and a resident taxpayer of said county, for the purpose of proving the fact of said shortage, when that fact is in issue.

13. Appeal: VERDICT: EVIDENCE. Contradictory testimony submitted to a jury will not be weighed in this court to ascertain which side produced the greater weight of evidence; but the verdict will be sustained if it is supported by sufficient competent evidence.

14. ———: HARMLESS ERROR. The evidence and the instructions in this case considered, and *held* not to exhibit prejudicial error sufficient to justify this court in reversing the judgment of the district court.

APPEAL from the district court for Dixon county: GUY T. GRAVES, JUDGE. *Affirmed.*

W. V. Allen and *W. E. Gantt,* for appellant.

J. J. McCarthy, W. D. McCarthy and *John V. Pearson, contra.*

ROOT, C.

Some years since plaintiff became involved in litigation with Dixon county over a claim made by him for services rendered as its clerk, and a counterclaim made against him for fees collected as such officer, and alleged to have been illegally retained. In 1898 plaintiff was defeated in that action, and in March, 1901, this court affirmed said judgment.

J. J. McCarthy, an attorney residing in Ponca, plaintiff's home, was employed to assist the county attorney in said litigation, and later became a candidate for congress. In November, 1901, plaintiff secured three affidavits, from as many persons, containing statements reflecting seriously on McCarthy's character, and during the summer and fall of 1902 actively published their contents throughout the congressional district wherein McCarthy and plaintiff resided. Defendant was chairman of McCarthy's congressional committee. He learned of plaintiff's conduct, made an investigation of the facts, secured copies

of the affidavits in plaintiff's possession, and procured counter affidavits from the persons who had signed and sworn to the ones used by plaintiff. The counter affidavits contained statements that affiants did not know or understand the contents of the affidavits given by them to plaintiff, and that the alleged facts therein stated were untrue. A few days before election defendant wrote and published the following article: "The republican congressional central committee has been informed that a base, slanderous attack is being made by our opponents on the character of Hon. J. J. McCarthy in these closing days of the campaign. The committee have carefully and fully investigated the statements being circulated and know them to be false in every detail; that they have been prepared for their supposed political effect, and are being used in an attempt to estrange voters from the republican candidate, and to promote the interest of the fusion nominee. This committee is in possession of counter affidavits showing conclusively that all of the charges against our candidate are absolutely false. J. J. McCarthy has led a clean and honorable life in this district for twenty years, and no breath of suspicion as to his morality was ever hinted until his political enemies in their desperation, knowing his strength with the people, conceived the idea of procuring perjured statements, with the hopes of thereby injuring his candidacy. Every fair-minded man will condemn this contemptible method of attack, and every lover of justice and fair play will register his protest against this outrage. The animus of this attack originated in a case in which J. J. McCarthy was employed to assist the county in an action brought to recover fees belonging to Dixon county, which T. J. Sheibley (meaning the plaintiff), as county clerk, failed to account for. This case is reported in 61 Neb. 409, and since which time T. J. Sheibley (meaning the plaintiff) has been active in originating and circulating false and malicious reports attacking the character of the republican candidate for congress in this district."

Plaintiff then instituted this suit to recover damages for the publication of said article. The only innuendoes in the petition are the two copied above, but it was generally alleged that the publication was false and malicious and made of and concerning plaintiff. Defendant answered, admitting the publication of the writing, "and alleges that the same is true, and that the defendant published the same with good motives and for justifiable ends." To the answer plaintiff replied: "Denies that the libelous matter set out in the petition is true, and further denies that the defendant published the same with good motives and for justifiable ends." Upon the trial plaintiff demanded that he be given the opening and closing of the case. The court denied the request, and thereupon plaintiff asked that he be permitted in the first instance to introduce testimony for the purpose of showing the circulation of the libelous article and the amount of his damages. This request the court also refused. Defendant then assumed the laboring oar, and the trial continued throughout two days. Immediately after the close of the evidence plaintiff moved "to strike out all the evidence in this case introduced by the defendant and direct a verdict for plaintiff," for the reason that there was no evidence showing the truthfulness of the libelous matter, and that the evidence did not tend to establish good motives on the part of defendant in publishing the alleged libel. The motion was overruled. The court limited the argument of counsel to 30 minutes on a side. Plaintiff's counsel moved for a modification of this order. The motion was overruled, and thereupon counsel waived argument because of the alleged insufficiency of time to present plaintiff's case to the jury. A verdict was returned for defendant, and plaintiff has appealed, assigning 94 alleged errors of the trial court. Not all the errors assigned are argued in the brief, and we will only consider those referred to in the written argument.

1. It is insisted that the answer does not state a defense to the petition, because the attempted justification

is a statement of the pleader's conclusion, and not an allegation of fact; that the alleged libel contains five distinct charges: (1) Making a base, slanderous attack on McCarthy's character; (2) circulating false statements for political effect; (3) procuring perjured statements for the purpose of injuring McCarthy's candidacy; (4) failure to account for fees while holding an office of public trust; (5) making such charges for personal revenge; that, to justify, defendant must have alleged with particularity every fact essential to sustain the truth of all said charges, and with a certainty sufficient to uphold an indictment. We do not think that the article should be construed as counsel interpret it. To us it seems to charge that plaintiff, from a desire to be revenged on McCarthy and defeat him for congress because that attorney appeared against him in his litigation with Dixon county, procured affidavits containing untruthful charges concerning McCarthy, and circulated them in the congressional district where McCarthy resided; that Dixon county had recovered a judgment against plaintiff for fees he had earned as clerk of said county and failed to account for. The article does not directly or indirectly charge plaintiff with embezzlement. The statement is not made that plaintiff committed perjury or subornation of perjury, nor does it appear from any allegation in the petition, or a reasonable construction of the language used in the article referred to, that an oath had been falsely taken or procured in any judicial proceedings, and therefore it does not indirectly charge any one with perjury or subornation of perjury. *Powers v. Miller,* 2 McCord (S. Car.), *220. Section 132 of the code provides: "In the actions mentioned in the last section, the defendant may allege the truth of the matter charged as defamatory, and may prove the same, and any mitigating circumstances to reduce the amount of damages, or he may prove either." The sufficiency of an answer justifying a publication, in an action for libel, depends upon whether the charge in the petition is general or specific. Where the charge is

specific, it is sufficient to state that the alleged defamatory words set forth in the petition are true. Where the charge is general, the answer must state facts which show that the defamatory words are true. And, generally, if the answer gives the plaintiff sufficient notice of what defendant will attempt to prove, it is sufficient. *McLaughlin v. Cowley,* 127 Mass. 316; *Dever v. Clark,* 44 Kan. 745; *Fenstermaker v. Tribune Publishing Co.,* 12 Utah, 439, 35 L. R. A. 611; *Hauger v. Benua,* 153 Ind. 642; *Stark v. Publishers Knapp & Co.,* 160 Mo. 529, 61 S. W. 669; *Kuhn v. Young,* 78 Tex. 344, 14 S. W. 796; *Myers v. Longstaff,* 14 S. Dak. 98. Plaintiff did not ask to have the answer made more definite and certain, and was ready with, and introduced, his evidence to show that the statements he circulated were true. Counsel objected to the introduction of a transcript of the proceedings in the case of *Sheibley v. Dixon County, supra,* as incompetent, irrelevant and immaterial, and moved to have it stricken from the record because the facts upon which it was based were not pleaded in the answer. At the close of taking testimony plaintiff's counsel also asked to have all evidence introduced by defendant stricken from the record, not because the answer was inadequate, but because the evidence itself did not make out a defense to plaintiff's case. Now, if the petition is definite concerning one branch of the case, it is that the libel charged plaintiff with failing to account to Dixon county for fees, that he was sued therefor and judgment rendered against him, and clearly an allegation in the answer that those statements were true was certain enough. None of plaintiff's requests to charge the jury intimate he was claiming that the allegations in the answer did not state a defense to the petition. One ground in the motion for a new trial is that the answer did not state a defense to the petition, but we think, unless the answer can be said to be totally insufficient, that objection came too late in said motion. After verdict, an answer treated by the parties

and the trial court as a sufficient plea of justification, will not be held bad on appeal (*Henderson v. Fox*, 83 Ga. 233, 9 S. E. 839), and we add it will be treated sufficient on a motion for a new trial.

2. Counsel for plaintiff argue that they had the right to open and close the case both as to evidence and argument. The court did not err in giving defendant the opening and closing. We held in *Sheibley v. Fales*, 75 Neb. 823, at the solicitation of plaintiff on the first appeal, that the burden was on the defendant, and that holding rules this case. Independent of our first decision herein, the trial court was correct. Counsel refer to the opinion of Mr. Justice MAXWELL, in *Omaha & R. V. R. Co. v. Walker*, 17 Neb. 432, as sustaining their contention that, where damages claimed are unliquidated, the plaintiff bears the burden of that issue. The opinion referred to was written in a condemnation case where pleadings are not required, and the amount of damage is the only issue for determination. In that case the landowner would have been defeated, in the absence of proof that he had been damaged by the taking of his property. In the instant case special damages were not claimed, and plaintiff, on the pleadings without any evidence, was entitled to a verdict. Except as directed by statute, the right to open and close in the trial of a case is a matter of practice within the control of the trial court, and its ruling, in the absence of an abuse of discretion, is not subject to review. In considering the subject Mr. Justice Frazer states that in England there was at one time much confusion on this subject, and that the *nisi prius* cases were confused and inharmonious in regard thereto; that finally, in 1845, in the court of Queen's Bench, after mature consideration, in *Mercer v. Whall*, 5 A. & E., n. s. (Eng.) 447, the rule was determined to be that the plaintiff should begin "when he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to the amount of damage to which he conceives the proof of such facts may entitle him." American courts and text-writers have

frequently adopted the reasoning of the English court, but the code in Nebraska has fixed an arbitrary standard to guide the courts in this particular, and taken from them any discretion they otherwise might possess. "The party who would be defeated, if no evidence were given on either side, must first produce his evidence. * * * In the argument, the party required first to produce his evidence shall have the opening and conclusion." Code, sec. 283. The burden of the issues was on defendant, and he had the right to open and close the argument. *Judah v. Trustees of Vincennes University*, 23 Ind. 274; *Tull v. David*, 27 Ind. 377; *Heilman v. Shanklin*, 60 Ind. 424; *McCoy v. McCoy*, 106 Ind. 492, 7 N. E. 188; *Stith v. Fullinwider*, 40 Kan. 73; *Zweibel v. Myers*, 69 Neb. 294.

3. Complaint is made that counsel were limited to 30 minutes' argument on a side. We do not approve this ruling of the trial court. Courts are maintained to administer and promote justice. Argument is often as essential as evidence to insure an intelligent verdict, responding to the facts and law in a case. In the instant case 13 witnesses testified, and two days, including one night session, were given over to the introduction of the evidence. The evidence was conflicting, and but few attorneys are so gifted with the power of analysis and concentration as to be able to properly present to a jury that testimony in one-half an hour. However, counsel for plaintiff refused to argue at all, and specifically waived argument for the alleged reason that they could not properly do so in the time alloted by the court. We are of opinion that they thereby waived any possible error in the court's order. We have twice held in felony cases that a limit of time for argument is not erroneous unless it is made affirmatively to appear in this court that the time allotted was consumed. *Hart v. State*, 14 Neb. 572; *Dixon v. State*, 46 Neb. 298; *Yeldell v. State*, 100 Ala. 26, 46 Am. St. Rep. 20, and excellent monographic note of Prof. Freeman, p. 23 *et seq.*

4. Counsel say: "The court erred in overruling appel-

lant's motion, made at the end of the taking of testimony, for an instruction submitting the case to the jury on the question of damages." They argue that the answer did not state a defense, and that the evidence did not justify the alleged libel, nor demonstrate that the publication was made with good motives and for justifiable ends. A sufficient answer is that the motion is silent concerning the insufficiency of the answer, and the evidence, if believed by the jurors, justified the publication of the article. The truth of the statements made by the respective parties and defendant's motives in publishing the article were for the jurors, and not the court, to pass upon.

5. Counsel complain of instructions numbered 1, 4, 5, 7 and 8 because of the alleged insufficiency of the answer. Having held that plaintiff was not in position to complain of any deficiencies in the answer, it is not necessary to further notice this complaint.

It is also urged that the second instruction of the court was erroneous in submitting the libelous character of the publication to the jury. It is as follows: "You are instructed that any written or printed statements which falsely and maliciously charge another with the commission of a crime is libelous. Language alleged to be libelous is to be construed in its ordinary and proper sense, and the question is whether the language, when so construed, conveys, or is calculated to convey, to persons reading it a charge of crime." The instruction was unnecessary, but it could not have prejudiced plaintiff. It purports to be an abstract proposition of law, but the jurors are not told to find for defendant, unless they found that the publication was libelous within the definition given by the court. The next succeeding instruction given informs the jury that the article set forth in the petition is libelous; that the law presumes it is false and was published maliciously; and that thereby plaintiff has been damaged. The case will not be reversed because the second instruction was given. Code, sec. 145; *Bingham v. Hartley*, 44 Neb. 682.

The seventh instruction is attacked because it instructs the jurors that, if defendant was acting as chairman of the congressional committee at the time of the publication, and in good faith published the defense of McCarthy, believing it to be true, then the jury, if they found the publication to be false and untrue, might take the fact that defendant believed his statement to be true as evidence of good motive and in mitigation of damages; and it is argued that, if plaintiff is entitled to recover, his damages can be compensatory only, and evidence in mitigation of damages will not be received. As the jury found for the defendant, this instruction, which we do not approve, could not have prejudiced plaintiff. *Gullion v. Traver,* 64 Neb. 51. The same criticism is made concerning the eighth instruction, and, for the reason that the verdict was for defendant, we hold this instruction was not prejudicially erroneous.

The tenth instruction, relating to the measure of damages, is criticised. It is as follows: "If you find for plaintiff, in cases of this kind the law presumes that plaintiff has suffered damages, the amount thereof being left to the sound discretion of the jury, and you are instructed that it is your duty to assess such amount as will compensate plaintiff fully for damages sustained, taking into consideration all the circumstances in evidence, and no witness need testify to any particular or specific acts." Objection is made to the last sentence because it is said the jury might infer that, unless some witness testified to damages, plaintiff ought not to recover. We do not agree with counsel. The words would benefit rather than prejudice plaintiff.

Instruction numbered 1, requested by defendant and given by the court, is excepted to. Thereby the jurors were charged that the defendant might, for the purpose of disproving malice, "show the foundation on which he bases the charge made by him against the plaintiff, and that he believed, and had reasonable grounds to believe, that the charge made by him was true, and the facts and circum-

stances which induced that belief, but such evidence is to be considered solely for the purpose of determining the question of the motives and good faith of the defendant." Now, the foundation on which defendant based his charge against plaintiff was that the stories plaintiff was circulating against McCarthy were false, and that plaintiff was impelled in his said attacks by a desire for revenge, and, taking that view of the case, this instruction was not bad. We do not think it amounts to instructing the jury that evidence that defendant believed said statements to be true would be received to disprove malice on his part.

Counsel for plaintiff say their third instruction should have been given. We think not. It would inform the jurors: "If the defendant had an opportunity to personally examine the facts with reference to any statements he claims plaintiff circulated against J. J. McCarthy, but did not do so, and uttered and published the libel in suit without making such investigation, he is liable in this case, and your verdict should be for the plaintiff." This instruction ignores the fact that all the statements concerning McCarthy might have been false and defendant convinced of their untruth without a "personal investigation," and restricts the jury, in considering defendant's motives and good faith, to the one fact referred to in the instruction, and it was properly refused.

The fourth instruction requested by plaintiff charged the jurors to ignore all of defendant's evidence and return a verdict for plaintiff. Comment is unnecessary to demonstrate its impropriety.

6. Counsel urge that the court erred in admitting in evidence a transcript of the proceedings in *Sheibley v. Dixon County, supra,* and argue that the judgment in favor of the county in that case does not prove in the case at bar that Sheibley was ever short in his accounts with that county. Counsel cite cases where the courts have held that the record of plaintiff's conviction of a crime could not be received against him in a civil action to prove that he had committed that offense. The transcript

was properly admitted to prove the existence of the litigation and its termination. 2 Elliott, Evidence, sec. 1525; *Littleton v. Richardson,* 34 N. H. 179, 66 Am. Dec. 759. We are of opinion, also, that the judgment was properly received to establish the fact that Sheibley was short in his accounts with Dixon county. Defendant was a resident of that county at the time said judgment was rendered. The litigation between Sheibley and the county originated in a claim filed by Sheibley with the county commissioners. From a decision in that case favorable to plaintiff, Fales, as a taxpayer, could have appealed to the district court. In the district court a counterclaim for fees illegally retained by Sheibley was filed by the county, and it recovered judgment thereon. If the county had been defeated on its counterclaim and a judgment had been rendered in favor of plaintiff, defendant herein, as a taxpayer, would in some degree have been called upon to contribute to the payment of that judgment. Furthermore, a taxpayer has such an interest in the finances of the county as to give him cause for action, acting in his own behalf and that of all other taxpayers, to conserve its property, and in a proper case to recover judgment in its favor, when its officials charged by law with attending to its affairs negligently and corruptly refuse so to do. *Frederick v. Douglas County,* 96 Wis. 411; *Quaw v. Paff,* 98 Wis. 586; *Shepard v. Easterling,* 61 Neb. 882; *Cathers v. Moores,* 78 Neb. 17; *Whedon v. Lancaster County,* 80 Neb. 682. Under all the circumstances, we think there was such a privity between the county and defendant as entitled him to introduce the judgment as proof of the facts it established between Sheibley and Dixon county. *Harmon v. Auditor of Public Accounts,* 123 Ill. 122, 5 Am. St. Rep. 502; *Bear v. Commissioners,* 122 N. Car. 434, 65 Am. St. Rep. 711; *Cannon v. Nelson,* 83 Ia. 242; *Hill v. Bain,* 15 R. I. 75, 2 Am. St. Rep. 873; *Owens v. City of South Omaha,* 2 Neb. (Unof.) 466. The evidence is not very satisfactory that Fales was a taxpayer in Dixon county, but he was, and had been for a number of

years, a resident therein, and had held the office of county judge some five years, and we think it hardly possible he was not taxed in some amount. Neither was objection made to the introduction of the transcript on the ground that Fales was not a taxpayer.

7. Finally, it is argued at length that the evidence does not support the verdict because it does not establish that the charges against McCarthy were untrue. It would not interest any one other than the litigants to comment at length on the evidence on this point. McCarthy under oath denied in detail the truth of those statements, and there were corroborating circumstances appearing in the record, which strengthened his testimony. The jury evidently believed McCarthy, rather than those who contradicted him, and we are bound by the verdict in that regard. It is also claimed that plaintiff was privileged in circulating his libel on McCarthy because he was simply trying to defeat a candidate for congress. A candidate for public office may be freely criticised, but a false charge of facts amounting to moral turpitude is libelous, whether published concerning a private citizen or a candidate for office. *Sweeney v. Baker,* 13 W. Va. 158, 31 Am. Rep. 757; *Farley v. McBride,* 74 Neb. 49. Aside from the time limit placed on the argument, this case seems to have been fairly tried by the district court. The other errors that have crept into the record were not prejudicial to plaintiff, and we think that the judgment of the district court should be affirmed; and we so recommend.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF NILS O. NILSON.

S. O. TJOSVOLD ET AL., APPELLEES, V. IVER S. BYGLAND, EXECUTOR, ET AL., APPELLANTS.

FILED JUNE 4, 1908. No. 15,166.

1. Charities: CHARITABLE USES: ENFORCEMENT. The doctrine of charitable uses as administered by the courts of chancery of England exercising judicial powers only, independent of the statute of 43 Elizabeth and of the *cy pres* power under the kingly prerogative, has been transplanted to this state, but in its enforcement the courts can exercise judicial powers only. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796.

2. ———: ———: CONSTRUCTION. Courts will view with favor donations by will for charitable purposes, and will endeavor to carry them into effect where the same can be done consistently with the rules of law. *St. James Orphan Asylum v. Shelby, supra.*

3. ———: TESTAMENTARY TRUSTS: BENEFICIARIES. Where the object of a testamentary trust is clearly charitable, and the property devised is certain and definite, and the trustee is clearly described and competent to take the devise and administer the trust, and the beneficiary is certain and definite as to the class, the bequest will not fail on account of the indefiniteness or uncertainty of the individuals who are the ultimate beneficiaries.

4. ———: ———: ———. An element of a charitable trust, as compared with a private one, is the indefiniteness and uncertainty of the ultimate beneficiaries. If the class of beneficiaries is described in general terms, the trust may be sustained and enforced, although the individual beneficiary is uncertain and his or her selection is expressly or impliedly left to the trustee.

5. ———: TESTAMENTARY BEQUEST: CONSTRUCTION. A bequest by a testator, who was a native of an island of the kingdom of Norway, to a church congregation or parish of the island, which body is by the laws of that kingdom capable of receiving such bequests and administering such charitable trusts, of a sum of money to be invested, and the income therefrom distributed annually "to worthy and needy servant girls and the widows and orphans of deceased sailors and fishermen who are not a public charge," and appointing three of the parish officers and their successors in office to carry out the provisions of the bequest, constitutes a charitable trust, and is sufficiently definite as to its objects, the trustee and the beneficiaries, so that it may be upheld.

6. ———: ———: ———. Provisions of the will set forth in the opinion construed, and *held* that it was the testator's intention that the income from the trust be distributed to those persons within the classes described who are inhabitants of the respective parishes to which the several bequests were made, and to authorize the designated trustees to select the individuals within the classes who are the ultimate beneficiaries.

APPEAL from the district court for Boone county: JAMES N. PAUL, JUDGE. *Reversed with directions.*

J. J. Sullivan and *J. A. Price,* for appellants.

H. C. Vail and *C. E. Spear, contra.*

E. Wakeley, C. B. Keller and *W. H. De France, amici curiæ.*

LETTON, J.

Nils O. Nilson, a resident of the county of Boone, on the 29th of December, 1904, made his last will, which was duly admitted to probate after his decease. At the time of his death he left neither widow nor children, and his only heirs at law were brothers and sisters and the children of deceased brothers and sisters. After the probate of the will and the appointment of an executor, his heirs at law filed a petition in the county court, praying that certain provisions of the will be declared illegal and of no effect, and that in respect to the property disposed of thereby that Nilson be declared to have died intestate and said property to have vested in his heirs, and asking that the executor pay the proceeds thus disposed of to them. The provisions of the will attacked are as follows:

"Sixth. Being a native of the Tjosvold, Karmoen, Kingdom of Norway, where fishing and sailing are the chief industries, and being acquainted with the social and industrial conditions of the poorer classes of Norway, my sympathies go out to industrious and deserving servant girls, and to widows and orphans of deceased fishermen and sailors. Desiring to relieve such servant girls and

widows and orphans, I give and bequeath to Akre church congregation (Akre Kirksogn) six thousand dollars, to be invested and reinvested forever in first mortgages on farm lands at the highest obtainable rate of interest; the principal shall remain inviolate, and the interest shall be paid annually on the first day of December, and be distributed on the following Christmas to worthy and needy servant girls and the widows and orphans of deceased sailors and fishermen who are not a public charge. I appoint the pastor (Sognepresten), the president of the county commissioners (Forman Sabets Ordforer), and the County Treasurer (Komunens Kaserer) of Akre Kirksogn and their successors in office, as trustees to carry out the provisions of this bequest. This fund shall be known as the 'Nils Olai and Gunild Nilson Tjosvold Julefund.'

"Seventh. I also give and bequeath to Bruflads church congregation (Kirksogn) Sondre Etnadalen, Valders, Kingdom of Norway, the sum of five thousand dollars, to be invested and reinvested forever in first mortgages on farm lands at the highest obtainable rate of interest; the principal shall remain inviolate, and the interest shall be paid annually on the first day of December, and be distributed the following Christmas to worthy and needy servant girls and the widows and orphans of deceased peasants or undertenants who strive and use their best efforts to maintain themselves and families so as not to depend on charity, but who are from force of circumstances unable to do so. I appoint the church pastor (Sognepresten), the president of the county commissioners (Forman Sabets Ordforer), and the county treasurer (Komunens Kaserer) of Bruflads Kirksogn and their successors in office forever, as trustees to carry out the provisions of this bequest. This fund shall be known as the 'Nils Olai and Gunild Nilson Tjosvold Julefund.'

"Eighth. I give and bequeath two-thirds of all the residue of my estate to Akre Kirksogn to become a part of the fund mentioned in paragraph six, and the remaining one-

third to Bruflads Kirksogn to become a part of the fund mentioned in paragraph seven of this my last will and testament."

Answers were filed to the petition by the executor and by the Akre church congregation and the Bruflads church congregation. After a hearing the county court found that the provisions of the sixth, seventh and eighth clauses of the will were void and of no effect, and directed the executor not to pay the bequests to the congregations. A like judgment was rendered in the district court upon appeal, from which judgment the cause is brought to this court for review.

The contentions of the plaintiffs in the case are that the bequests contained in the sixth, seventh and eighth paragraphs of the will are indefinite and uncertain as to the beneficiaries and the objects of the testator's bounty; that such bequests are for the benefit of no defined class of persons, nor are the beneficiaries thereby confined to any particular locality; that the bequests are too indefinite and uncertain to be enforced, and are therefore void; that the trustees named in the will are not empowered by the testator to select the beneficiaries of such bequests and therefore that all of them must fail. We have been favored with able and painstaking briefs upon the questions involved, and with interesting oral arguments, not only by the attorneys for the respective parties to this proceeding, but by other learned and able counsel who are interested in a like question which may arise with reference to the will of John A. Creighton, in an action now pending in Douglas county. Much learning and diligence has been displayed by counsel in the presentation of the law with reference to the doctrine of *cy pres*, and whether or not testamentary trusts for charitable uses were administered by courts of chancery in England, exercising judicial powers alone, prior to the enactment of the statute of 43 Elizabeth; it being maintained by the plaintiffs that the trusts sought to be created by the will in question are so indefinite as to beneficiaries that they

can only be upheld and administered by a court exercising the *cy pres* power, such as exercised by the courts of England under the statute of 43 Elizabeth and under the king's prerogative power, and not by virtue of judicial functions. In view of the decision of this court in the case of *St. James Orphan Asylum v. Shelby,* 60 Neb. 796, we deem it unnecessary to go into an extended review of a number of the questions discussed. We may therefore begin the consideration of this case, having it established by that opinion as the law of this state that the provisions of the statute of 43 Elizabeth for the administration of charitable trusts are not enforceable in this state, and that the doctrine of administering charitable trusts, *cy pres,* under the kingly prerogative is inapplicable. It is further settled by that case that the courts of this state have equal power in the administration of testamentary trusts for charitable uses as were possessed by the courts of England prior to and independent of the statutes of 43 Elizabeth, and that testamentary bequests for charitable purposes will be viewed with favor and will be carried into effect, if the same can be done consistent with established principles.

It appears from the record that in the kingdom of Norway there is a union of church and state, and that church congregations have from time immemorial constituted organizations or parishes somewhat of the nature of municipal corporations, having clearly defined territorial boundaries, and whose affairs are administered by officers selected or appointed in conformity with law, and possessing definite administrative powers. It further appears that bodies of this character, under the laws of Norway, have power and authority to accept such bequests as were made by Nilson, and to assume and administer trusts of the character mentioned in the will. The congregations interested have signified their acceptance of the bequest, and their consent to assume the trust imposed and to administer it through the officers named and their successors in office. It appears, then, that there is no room

for contention over the fact that a definite trustee exists, competent to accept the trust, and able to administer it. It is suggested in the brief of the appellees that the persons now occupying the offices, the respective and successive incumbents of which are designated as trustees to administer the provisions of the will, have no power to bind their successors, but this we think is of no importance. It is the congregation or parish to whom the bequest is made, and the administration only is committed to its officers. The trustee which takes and holds the bequest is a continuing body, and the administration of the trust is a duty which appertains to the respective offices and is to be performed by the incumbents thereof. It is a duty owing to the congregation, and not to the present holders of the office, who are *ex officio* administrators of the trust, and is one which the congregation has the power or right and the authority to compel the proper performance of.

The main question in the case is whether or not the beneficiaries designated in the will are certain and definite enough so that the trustees may administer the trust without further direction or ascertainment than that furnished by the language of the will itself; or, if it shall be found that the description of the ultimate beneficiaries in the will is not sufficiently definite so that the trust may be so administered, whether any discretion or power is vested in the trustees to select or ascertain from the members of the indefinite class described the individuals who should be the recipients of the testator's bounty.

It is one of the characteristic qualities of a charitable trust that the persons or individuals for whose particular benefit the gift is made are not and cannot be definitely ascertained or pointed out in the gift. "In order that there may be a good trust for a charitable use, there must always be some public benefit open to an indefinite and vague number; that is, the persons to be benefited must be vague, uncertain, and indefinite, until they are selected or appointed to be the particular beneficiaries of the trust

for the time being." 2 Perry, Trusts (5th ed.), sec. 710. "It is said that vagueness is, in some respects, essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins." 2 Perry, Trusts (5th ed.), sec. 687. It is the very indefiniteness with regard to individual persons which brings it within the class of charitable gifts. 3 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1018; *Russell v. Allen,* 107 U. S. 163; *Sowers v. Cyrenius,* 39 Ohio St. 29, 48 Am. Rep. 418. For, if the individuals are named, it is a private, and not a public charity. Where the trustee is certain, the general rule as to beneficiaries may thus be stated: If the ultimate beneficiaries are members of a class or species of persons and the will itself points out such class or species with sufficient definiteness so that if the trustee refuses to act a court could enforce the trust, the designation of the beneficiary is sufficiently definite; or, if a power of selection of individuals from the members of a class is given by the will to the trustee, either expressly or by implication, the rule that that is certain which may be made certain applies, and the trust will not fail for want of a beneficiary. Conversely, unless the beneficiaries are pointed out in the will in a sufficiently definite manner as to class, or unless the trustee is given by the will, either expressly or impliedly, the power of selection as to individual recipients, the bequest is not sufficiently definite, and the estate will not pass. 2 Perry, Trusts (5th ed.), sec. 732. The cases bearing upon the general subject of charitable trusts are many, and the exact language of the bequests is different in almost every case. We cite the following as being most enlightening upon the point here to be decided. In the main they are from courts holding that neither the statute of Elizabeth nor the prerogative power of the king is the source of their authority over charitable trusts, which is the doctrine of this court.

A bequest to trustees of a sum to be devoted, "under such regulations as to the said trustees and overseers may

seem best, to the free education of such young men as may desire to take advantage of the said endowment by way of their preparation for entrance into the naval academy at Annapolis, Maryland, or such as may fit them to become mates or masters in the merchant marine service," and to such apprentices "as * * * may apply for appointment from civil life in the steam engineering department of the United States navy," was upheld as being a special charitable trust, and it was further held that the trust was not void for uncertainty or incapacity of execution apparent on its face. *Columbia University v. Taylor*, 25 App. D. C. 124. In *Tincher v. Arnold*, 147 Fed. 665, the bequest was in trust to create a fund to be used to establish and maintain a school "for the purpose of educating boys who reside in the state of Illinois, between the ages of 12 and 18 years, and who are unable to educate themselves." The circuit court of appeals held, Judge Sanborn writing the opinion, that the bequest was "not void for want of a class of boys to which the charity may apply, because of the existence in the state of a system of public free schools open to all boys of such age without charge, nor because of uncertainty as to the individual beneficiaries." In the same case it was urged that the bequest was indefinite, for the reason that no power was granted to the trustees to select the charitable donees. The will appointed the trustees "for the purpose of carrying out the full terms" of the will, and directed that they manage the estate. But the court said: "We think the will intends the trustees to manage the estate after the building should be built; and that this objection is not well taken" —citing *Guilfoil v. Arthur*, 158 Ill. 600. The above conclusions are reached in these cases without reference to the question whether the courts of Illinois would administer a charity under the *cy pres* doctrine. As to another point in the case, this question is considered, and it is held that the modified *cy pres* doctrine would be followed by the courts of that state, involving not what is known as the prerogative power, but what has been termed the

judicial power of *cy pres,* and the *Crerar* will case, *Crerar v. Williams,* 145 Ill. 625, was cited as an example of the application of this doctrine.

A bequest of all of an estate to be "the basic endowment, founding, establishment, and maintenance of a home or homes for industrious girls and women, without respect to age or sect; the first to be established in the counties of Allegheny and Beaver. Others can be located elsewhere, as the fund shall grow adequately"—was held not too indefinite to be upheld in Pennsylvania. In that state the court is empowered by statute to prevent the failure of a trust by supplying a trustee. This statute was enacted in 1885, and Pennsylvania cases since that time have been based upon that statute, but the court say: "but even under the old rule the power to act at discretion in the administration of a charity need not have been expressly given, for it could be implied from the nature of the trust, *Pickering v. Shotwell,* 10 Pa. St. 23, and here there was a very large discretion implied in respect of the buildings and management of the Home." The court held, therefore, that the trust was sufficiently definite, and that discretion was conferred upon the trustee to administer. *Daly's Estate,* 208 Pa. St. 58. In *Eliot's Appeal,* 74 Conn. 586, a bequest of a sum which "I direct the wardens and vestry of the St. Paul's society to invest in such a manner as will best provide a home for ladies of advanced age, or infirm, who are or who may hereafter become connected with the said St. Paul's church society," was upheld. The court said: "This bequest to St. Paul's society is to be invested by its wardens and vestry 'in such a manner as will best provide a home' for those of the class specified who may need such relief. The power to decide as to the best means of applying the funds for this purpose is impliedly given to the society. It inheres in the trust. *Woodruff v. Marsh,* 63 Conn. 125; *Mack's Appeal,* 71 Conn. 122." *Coleman v. O'Leary's Executor,* 114 Ky. 388, 70 S. W. 1068, contains an inter-

esting historical review of the Kentucky decisions with reference to the statute of Elizabeth and the *cy pres* powers, and of subsequent legislation in that state upon the subject of charitable uses. The Kentucky courts first gave full effect to all the *cy pres* powers of the English courts, both judicial and prerogative. *Gass & Bonta v. Wilhite,* 2 Dana (Ky.), *170, 26 Am. Dec. 446. But this doctrine was limited by later opinions, beginning with *Moore's Heirs v. Moore's Devisees & Executors,* 4 Dana (Ky.), *354, 29 Am. Dec. 417, to the judicial powers possessed by the English courts independent of prerogative or of the statute of Elizabeth. In 1852 another statute was adopted. This statute was construed in *Cromie's Heirs v. Louisville Orphans' Home Society,* 3 Bush (Ky.), 365, by Judge Robertson, who wrote the opinion in *Moore's Heirs v. Moore's Devisees & Executors, supra.* The court say, speaking of Judge Robertson: "He believed, and said so in the opinion, that the object of the repeal of the British statute 'was to substitute a system more congenial with our institutions, and by a legislative endorsement of the doctrine suggested in *Moore's Heirs v. Moore's Devisees & Executors* to eliminate the *cy pres* doctrine of England.' So that the law in Kentucky by statute seems to be substantially that declared by this court in the *Orphanage* case. The court continues: "The court will, under the statute, settle who are the beneficiaries of a trust, if one is created, but it must settle them from the words of the gift; they must be judicially ascertained. It is not doubted that the individual beneficiaries of the bounty need not be named. That would render the gift a mere private use, and subject to the rule against perpetuities." It was held that a "bequest in trust to the 'Bishop of the Catholic Diocese of Louisville for the establishment of a home for poor Catholic men'" was not void for being indefinite as to the location of the home or the beneficiaries; the court holding, with some hesitation, that a bequest being made to the bishop as an officer of the church in his official capacity, having juris-

diction as such over charitable institutions of like character within a defined territory, the court would presume that the donor made the gift upon terms in harmony with the purposes of kindred organizations in that ecclesiastical jurisdiction, and for the benefit of such similar objects of charity as are provided for in that district. See, also, *Thompson's Executor v. Brown*, 116 Ky. 102, 62 L. R. A. 398. In Arkansas a bequest to a pastor, to be used by him "for the purpose of helping to establish a school in said parish for the education of Catholic boys and for helping to educate young men of the parish for the priesthood," was upheld, the court saying: "A class to be the object of the bounty is plainly designated, and the selection of the individuals out of that class is left to the discretion of the trustee." *McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952. This case is somewhat weakened as authority in this state by the fact that it follows an early Arkansas case, *Biscoe v. Thweatt*, 74 Ark. 545, 86 S. W. 432, which held that the statute of Elizabeth was in force in that state. In *Clement v. Hyde*, 50 Vt. 716, 28 Am. Rep. 522, a bequest as follows: "I give the use, interest, and income, after my decease, the sum of one thousand dollars in cash to the treasurer of the county of Orange and his successors in office; the income of said one thousand dollars to be expended in the education of the scholars of poor people in the county of Orange"—was sustained, the court holding that there was a discretion in the trustee to select the individuals, saying: "In the case at bar the testator orders the trustee to apply the income to the declared purpose. Its application implies the exercise of discretion. * * * If the trustee had applied the income arising from the trust fund in good faith, and in the exercise of ordinary discretion in the purchase of books, payment of tuition or board of any of the class of scholars indicated, no one, we think, would doubt about his accomplishing the intention of the testator." This is followed in *New Haven Young Men's Institute v. City of New Haven*, 60 Conn. 32. In Iowa the

cy pres doctrine is expressly repudiated. In *Grant v. Saunders,* 121 Ia. 80, a bequest "to Barbary R. Fouche, in trust, the remainder of my estate whatever it may be, for the benefit of the poor, and to be given by her to such objects, as in her judgment is worthy of assistance, from time to time, and at such times and persons as she thinks best to help," was held to be sufficiently definite as to beneficiaries. The court held that to administer this charity it need not go to the extent of recognizing the *cy pres* doctrine. It said: "The trustee and the class are then definite and certain. All that remains to be done to administer the trust is the selection of the beneficiaries from the designated class, and the only uncertainty is as to who they shall be. The bequest could not well have been more specific as to the persons or objects of the testator's bounty without destroying its character as a charity, because uncertainty is one of the elements of a charitable gift. * * * And it is settled in this state that the trustee may legally select the beneficiaries." The court held, further, that "even if the trustee failed to act, her successor might select the objects of the testator's bounty, though the will does not expressly provide for the appointment of others by whom the objects are to be selected." This can only mean that the nature of the trust implies the power of selection in the trustee, whoever he may be, since no express right to select is given in the will to Barbary Fouche's successors. In *Hunt v. Edgerton,* 80 N. E. (Ohio St.) 1126, it is held that the individual beneficiaries of a charitable trust must necessarily be vague and uncertain; that it is sufficient if a class is designated from whom the trustees can select; and that such a trustee has, without special delegation thereof, incidental authority to select from the classes named or individual beneficiaries thereof.

We deem it unnecessary to enter upon an exhaustive statement of the history of judicial opinion of the courts of the several states and of the United States upon the

general subject. It may be said, however, that the result of the earlier cases, influenced, no doubt, by the great name of Marshall, in the case of *Baptist Ass'n v. Hart's Executors,* 4 Wheat. (U. S.) 1, tended to a stricter insistence upon definite beneficiaries, and to limit the powers of a court of chancery in the administration of charitable trusts, upon the assumption that all of the ancient powers of that court in that regard were derived by virtue of the kingly prerogative or by the statute of Elizabeth, but that the later decisions have recognized the existence of judicial powers exercised in the control and administration of such trusts by the court of chancery anterior to and independent of the statute of 43 Elizabeth, and not based upon prerogative. In this connection, in Wisconsin, compare *Ruth v. Oberbrunner,* 40 Wis. 238, and *Heiss v. Murphy,* 40 Wis. 276, with *Harrington v. Pier,* 105 Wis. 485; in Iowa, *Lepage v. McNamara,* 5 Ia. 124, with *Grant v. Saunders,* 121 Ia. 80; in the United States supreme court, *Baptist Ass'n v. Hart's Executors,* 4 Wheat. (U. S.) 1, with *Russell v. Allen,* 107 U. S. 163, and *Romney v. United States,* 136 U. S. 1; in Connecticut, *White v. Fisk,* 22 Conn. 31, with *Woodruff v. Marsh,* 63 Conn. 125; in Indiana, *Grimes' Exr's v. Harmon,* 35 Ind. 198, with *Board of Commissioners v. Dinwiddie,* 139 Ind. 128; in New York, *Wright v. Trustees,* 1 Hoff. Ch. (N. Y.) 201, an exhaustive opinion, *Williams v. Williams,* 8 N. Y. 526, with *Allen v. Stevens,* 161 N. Y. 122, which reviews the course of decisions and legislation on the subject in that state; and on the general subject see the exhaustive historical argument of Mr. Binney in the *Girard* will case, *Vidal v. Girard's Exr's,* 2 How. (U. S.) 126, which is a marvel of forensic skill and industrious research; also, 2 Perry, Trusts (5th ed.), sec. 694, and Underhill, Wills, sec. 817. We believe that the later expressions of the courts are more in conformity with sound reason, and more in consonance with the principles of charity and benevolence, which should be favored and upheld by the

courts whenever it can be done without violence to established principles, than the earlier decisions are.

Having reviewed these cases, let us examine the facts before us. Does the will itself point out with sufficient certainty the persons to be benefited? In determining this question we are not confined to the language of that paragraph of the will alone which bestows the charity, but, in endeavoring to ascertain and effect the intention of the testator, we are at liberty to examine the whole instrument, and, if from the whole will, the person or persons, class or classes, for whose benefit the bequest is made may be ascertained, the will is sufficiently definite and the trust may be administered according to the testator's intention. *St. James Orphan Asylum v. Shelby, supra; American Tract Society v. Atwater,* 30 Ohio St. 77, 27 Am. Rep. 422. We think it unnecessary to discuss whether the object is charitable. The language "to worthy and needy" persons of the class seems clear enough.

It appears from the will that Nilson had a sister living at Akre Haven, Karmoen, Stavanger, "Amt." Norway; that he was a native of the "Tjosvold, Karmoen"; and that one of the congregations to whom the bequests are made is the Akre congregation, Karmoen. Courts will take judicial notice of natural boundaries and of geographical conditions, as well as of the larger political divisions and subdivisions. Using this privilege, it appears that the word "Karmoen" means "of Karmo," that Karmo is an island off the western coast of Norway belonging to the Stavanger province or "Amt," and that Akre or Akre Haven is a village or hamlet situated on this island. It also appears that Valders, in which the Bruflads congregation is situated, is an inland district of Norway, and it was stated upon the argument that this parish was the former home of the testator's wife. We think it apparent from the fact of the testator's birthplace being upon the island of Karmo, "where fishing and sailing are the chief industries," and from the fact that the bequest was made to a congregation or parish situated

upon this rocky island, and from the fact that the benefaction is to be distributed on Christmas day by the pastor and other local officers of the parish, that his bounty was intended for the "worthy and needy servant girls and the widows and orphans of deceased sailors and fishermen who are not a public charge" belonging to the parish of Akre and to the island of Karmo. As to the bequest to the inland parish of Bruflads, since it is to be distributed under the same conditions as the other trust, we are of the opinion that it was the testator's intention that the beneficiaries should be those individuals belonging to the classes mentioned in the bequest who belong to the Bruflads parish. We are aided to this conclusion by the consideration of the limited amount of money which the investment of the sums bequeathed would in all probability produce when invested by the trustees. But, even though the beneficiaries are considered not to be limited to those of the classes mentioned who reside within the respective parishes, we do not think the trust too indefinite to be administered. It is clearly limited to persons of the classes named living in the kingdom of Norway. Like bequests have frequently been upheld by the courts, even though applying to classes or individuals to be selected from a much larger field than that of the kingdom of Norway.

We are also of the opinion that the designation of the respective officers whose duty it shall be "to carry out the provisions of this bequest" impliedly confers upon these officials the power to select from within the class the individuals who shall receive the bounty. It was, no doubt, with reference to the peculiar opportunities for knowledge as to the condition of the poor servant girls and widows and orphans afforded to these officers by virtue of their church relations that the testator selected them to execute the trust. It was impossible for him to select the individuals. He could only designate a class, and leave it to his trustees to select the individual beneficiaries of the charity, and no one seemed to him to be better fitted or to

possess better qualities than those who resided among the poor people whom he wished to help; and the pastoral relation of one of the trustees, and the selection to official positions of the others, at least implies the existence of the qualities necessary to make them faithful and competent administrators of the trust. We are convinced that the testator by the will clearly showed his intention to create a charity. He indicated its general nature and purpose, and described in general terms the class of beneficiaries whom he desired to profit by his bounty. The trustees to administer the bounty were clearly pointed out by the will, and they were empowered to carry the provisions of the instrument into effect.

In conclusion, we are of the opinion that the bequests to the two congregations and the officers designated as trustees to carry the provisions of the bequest into effect are sufficiently definite and certain as to the trustees, and that the provisions of the will as to the class of beneficiaries and as to the selection of the individuals who are to receive the charity are sufficiently definite, so that they are in all respects valid and enforceable.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter a decree in accordance with this opinion.

REVERSED.

WILLIAM M. CUBBISON V. A. D. BEEMER, WARDEN OF STATE PENITENTIARY.

FILED JUNE 4, 1908. No. 15,633.

Information: FILING IN VACATION. "Under the provisions of chapter 108 of the laws of Nebraska passed in 1885, the requirement that 'all informations shall be filed during term, in the court having jurisdiction of the offense specified therein,' is mandatory, and an information, upon which the accused is to be tried for felony, is void if filed in vacation." *In re Vogland*, 48 Neb. 37.

ORIGINAL application for a writ of habeas corpus. *Writ allowed.*

McAllister & Cornelius, for plaintiff.

William T. Thompson, Attorney General, Grant G. Martin and *W. N. Hensley, contra.*

REESE, J.

This is an application for a writ of habeas corpus. The writ was issued, directed to the respondent, who is the warden of the state penitentiary, and who made return that he held the custody of the petitioner by virtue of a judgment of the district court for Platte county, by which the said Cubbison was convicted of a felony. A certified copy of the judgment of conviction is set out in the return. By the petition and all the record in this cause it is made to appear beyond dispute that the information, charging the accused with the commission of the offense for which he was convicted, was filed in the office of the clerk of the district court on the 28th day of February, 1908, and that the court was not then in session, having adjourned *sine die* on the 27th day of the same month; that the next term began on the second day of March following. This being true, it must be conceded that, under the holdings of this court in the matter of the application of *Lewis Vogland, Salem T. Clark* and *Charles H. Jackson* for a similar writ (*In re Vogland,* 48 Neb. 37), the petitioner is entitled to his discharge.

Exhaustive briefs have been furnished by the county attorney and the attorney general, and, were it not that the court has held in the case above cited that "this information (filed out of term time) was therefore void, and upon it no plea could be received or acted upon," and that "the requirement of filing in term is mandatory, and a filing in vacation cannot be substituted," we would be strongly inclined to hold that the irregularity in failing

to comply technically with the statutory provision was waived by the proceedings subsequent to the filing of the information, which consisted of a demurrer to the information, a plea of not guilty, and a jury trial. But, if the information was "void," as squarely decided in that case, we cannot conceive of its being made valid by any waiver. While, in the case cited, the decision was correct upon the facts as therein presented, yet the writer hereof cannot clearly see that the information should have been held void. Such, however, is that decision, and we are impelled to recognize it as the law of this state.

It follows that the order for the discharge of the petitioner from custody will have to be entered, which is accordingly done.

WRIT ALLOWED.

SHELTON IMPLEMENT COMPANY, APPELLANT, V. FRED SCHIECK ET AL., APPELLEES.

FILED JUNE 4, 1908. No. 15,226.

Notes: VALIDITY An agent for the sale of machinery took a note from a purchaser representing a commission or bonus on the sale, the amount of which he added to the purchase price. He also received from his principal "commission certificates" showing the amount of commission due from his principal, and payable when the notes given by the purchaser of the machinery were paid. *Held*, That the commission or bonus note exacted by the agent from the purchaser was voidable at the option of the maker.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

W. D. Oldham, for appellant.

H. M. Sinclair, contra.

DUFFIE, C.

The plaintiff brought this action on a promissory note made by the defendants August 15, 1898, and due October

1, 1899. The facts surrounding the giving of the note, as claimed by the defendants, are as follows: In the fall of 1898 defendants purchased a threshing outfit from Russell & Company of Council Bluffs, Iowa; such purchase being made through the plaintiff, who was agent for Russell & Company at Shelton, Nebraska. When the threshing outfit was delivered, it was settled for by the notes of the defendants, and the note in suit was signed at that time, and, as defendants supposed, as one of the notes going to Russell & Company in payment of the threshing outfit. The defenses alleged against its enforcement are, first, that it was fraudulently obtained; second, that the plaintiff was the agent of Russell & Company, and acted for Russell & Company in selling the machine; third, the statute of limitations. The case was tried to the court, and a judgment entered dismissing the plaintiff's petition.

The threshing outfit purchased by the defendants was second-hand machinery, and the plaintiff claims that the defendants executed the note in suit in consideration of their being able to obtain the machinery at a cut price. In support of this contention it introduced in evidence the following writing: "Shelton, Nebraska, August 2, 1898. This agreement, made this day with James Stevens, provides that, whereas I have ordered through the Shelton Implement Co. and him a threshing outfit from the Russell company of Council Bluffs, and on which there has been a cut made from the prices as quoted me by the said Shelton Implement Co., and James Stevens, to give him or them my note or notes, in the sum of $200, and due October 1, 1899, and secured on the same property and secured in all particulars as order given for machinery provides, said note or notes to draw same interest as said machinery, viz., 6 per cent. Witness whereof I have hereunto affixed my signature the day and date as last above written. Fred Schieck." Both Fred and Henry Schieck testified that, when the machinery arrived at Shelton, they unloaded it from the car, and steamed up the engine for the purpose of going into the country about seven miles;

that Stevens, who acted for the plaintiff, requested them to sign the notes and mortgage before going away; that they went to his office, where he had all the papers prepared, and, without reading them, they signed what they supposed were the purchase notes for the threshing outfit, and had no knowledge that the note in suit was among the number; that no agreement had been made to pay Stevens, or the plaintiff, a bonus for securing the machinery.

The law is well settled that an agent is not entitled to a commission from both seller and buyer, unless it is so agreed and understood by all parties to the transaction. Stevens, the manager for the plaintiff, contends that plaintiff was not an agent of Russell & Company, who sold this threshing outfit, and he offered in evidence several letters received from Russell & Company's manager in support of this contention. In one of these letters, of date July 12, 1898, and apparently referring to another transaction, Russell & Company's manager says: "You state that you think that you will be able to get such security as will insure both the amount going to us and to you for commission. We hardly see what you mean by this, unless you expect to take separate notes for commission. The way we sell goods through agents is this: The notes run to us, and the commission is payable to the agents *pro rata* as each note is paid. We issue the agent a certificate showing the amount of his commission in each note, this commission certificate to share in interest and expense of collection. Please make settlement with purchasers accordingly." The secretary of a Council Bluffs company, acting for Russell & Company, testified that the plaintiff, the Shelton Implement Company, or James Stevens, acted as agent for Russell & Company in making this sale, and that the Shelton Implement Company received three commission certificates, one for $100, one for $375, and one for $192.50, to be paid as commission from the proceeds of the purchasers' notes when collected; that the only interest in the matter which the Shelton Imple-

ment Company had was its commission interest, which was payable as the notes were collected. It is true that the record shows that defendants did not pay their notes given Russell & Company on the purchase of this outfit, and that their notes were returned to them on their surrendering the machinery to Russell & Company; but the fact that the Shelton Implement Company, or Stevens, who acted for it, accepted commission certificates from Russell & Company for making the sale is ample evidence to support the findings of the court that the plaintiff was the agent of Russell & Company, and had contracted and agreed to accept from the company a commission for the sale. This being so, the note in suit is without consideration and voidable, as an agent cannot make a valid contract where in the same transaction he acts as agent for both parties, unless that fact is disclosed. *Levy v. Loeb,* 85 N. Y. 365; *Meyer v. Hanchett,* 39 Wis. 419; *Walker v. Osgood,* 98 Mass. 348. An agreement between the agent of one party and another party to pay commission on a sale of his principal's property is void. *Bollman v. Loomis,* 41 Conn. 581. In *Porter v. Woodruff,* 36 N. J. Eq. 174, the court said: "The moment an agent ceases to be the representative solely of his employer, and places himself in a position toward his principal where their interests may conflict, no matter how fair his conduct may be in the particular transaction, he ceases to be that which his service requires and his duty to his principal demands. In such cases the courts do not stop to inquire whether the agent has obtained an advantage, or whether his conduct is fraudulent or not, but, if the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, the courts will not speculate concerning the merits of the transaction, but at once pronounce it void as against public policy."

We are satisfied that the plaintiff, or its manager, Stevens, was acting as agent for Russell & Company in negotiating this sale, and that the note in suit, if not

fraudulently obtained from the defendants, is voidable as representing an agreement by the purchaser to pay a commission upon a sale made by the plaintiff as agent of Russell & Company from whom certificates for the payment of a commission were also accepted. The evidence may well support a finding that the note was fraudulently obtained. If the testimony of the defendants is to be accepted, there was no understanding that plaintiff was to be paid by the defendants for securing for them this threshing outfit. When defendants were called to Stevens' office to "sign up," as they term it, the papers were all made out, and their signature was obtained on the understanding, on their part, that they were signing only the notes and mortgage representing the purchase price of the thresher. Nothing was said or heard of this until the last day of grace, when it was sued.

We recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GUS A. JUGENHEIMER, APPELLANT, V. STATE JOURNAL COMPANY ET AL., APPELLEES.

FILED JUNE 4, 1908. No. 15,229.

Intoxicating Liquors: LICENSE. It is not an abuse of the discretion vested in the excise board of a city to refuse a license for the sale of intoxicating liquors at a place in the near vicinity of the post office and United States court house, or at any other locality in near proximity to a place which women and children, in large numbers, are daily required to visit for business or other proper purposes.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

E. J. Murfin and *T. J. Doyle,* for appellant.

Hall, Woods & Pound, John M. Stewart and *T. F. A. Williams, contra.*

DUFFIE, C.

The excise board of the city of Lincoln consists of the mayor and two members chosen by the electors of the city. Section 64 of the charter grants to the excise board the following power: "The excise board shall have the exclusive control of the licensing and regulating the sale of malt, spirituous, vinous or intoxicating liquors in such city. * * * The excise board may license, regulate or prohibit the sale or the giving of malt, spirituous, vinous, mixed or fermented intoxicating liquors in said city." The applicant filed his petition with the excise board asking a license to retail intoxicating liquors at No. 916 P street, in the city of Lincoln, for the municipal year of 1907. At the time of filing his application he was engaged in the retail liquor business at said location, and had been for a year or two previous to that date. The State Journal Company, a corporation, filed a remonstrance against granting the license. A hearing was had, and the license refused. Upon appeal to the district court, taken by the applicant, the action of the excise board was affirmed, and the applicant has appealed to this court.

What is known as the "Government Square," in the city of Lincoln, is bounded on the north by P street. On the Government Square is located the United States post office and court house, and naturally it is visited by many persons, including women and children, each day in the year. From the record it is manifested that the excise board had adopted the policy of excluding saloons from all buildings on the north, east and west side of the Government Square. The record shows that during the year 1906 three licenses were granted to parties to

operate saloons in the block on P street fronting the Government Square. The excise board granting such licenses made of record the following statement relating thereto: "Be it resolved by the excise board of the city of Lincoln, Lancaster county, that, in consideration of the granting of the licenses to the applicants as follows: John V. Helm, No. 926 P street, Mark J. Wilbur, No. 938 P street, and Gus A. Jugenheimer, No. 916 P street, for this municipal year, the applicants shall not ask for licenses on the north side of P street from Ninth to Tenth streets. Be it further resolved that it is the sense of this board that after the end of this municipal year no licenses shall be granted to any one on the north side of P street between Ninth and Tenth streets." These resolutions were adopted by the unanimous vote of the board. Again, on February 20, 1907, the following resolution was adopted: "Be it resolved that it is the sense of the excise board that no saloon licenses for the municipal year commencing April, 1907, be granted to any applicants on the north side of P street between Ninth and Tenth streets." The final action of the board in refusing a license to the applicant, as appears from its record, is as follows: "Mr. Harpham. I would like to state that we talked this matter over a number of times, and we declared a policy of not granting a license on the three sides of that block, and I think we have a right to do that, leaving out the matter of the remonstrance entirely. It was largely on account of that new building there, and in one sense at the government's request, and I feel that I have got to vote against these applications purely on location. Mr. Powell. I move that the license be not granted. Seconded. Carried. Voting Aye, Powell, Harpham. Nay, Brown." Mr. Brown explains his vote as follows: "As there is some question as to the right of the board to arbitrarily refuse licenses on account of location, I would like to see it decided, and I therefore vote 'no.'"

The applicant insists that the excise board was gov-

erned in this case by the wish and will of the protestant, the State Journal Company, and it is argued that the board should be governed in its actions wholly by their own views of what the public interest demands, and not by the wish, desire, or interest of any resident, or the business interest of a private citizen or corporation. We are in entire accord with the applicant that the public interest alone should be looked to by the board in its action in granting or refusing a license, but we cannot say from the record in this case that the board was unduly influenced by the protest filed by the State Journal Company. The record, indeed, presents a state of facts from which an entirely contrary inference should be drawn. It is true that the State Journal Company owns lots 7, 8 and 9 fronting on P street, and but one or two doors west of the Jugenheimer location. It is also shown that the Burlington depot is located on P street, one or two blocks west of the block occupied by the State Journal Office, and it is claimed that the numerous passengers using that depot, and who are obliged to pass on P street to reach the business center of the city, turn to the south on reaching Ninth street, and travel diagonally across the Government Square to O street, the reason being, as claimed by the State Journal Company, that they do not like to pass along the block on which the State Journal offices are located on account of the saloons which formerly occupied the buildings in that location. The protestant further introduced evidence to show that many of its patrons and customers who would naturally use P street to reach its place of business were inconvenienced by having to take other and different routes to approach the State Journal building on account of the saloons located in that block, and which they did not care to pass; that it had about 250 employees, and that complaints have been made on account of the character of the persons who naturally visited and loitered about the saloons in question.

It may be that the business interest of the State Journal Company would be enhanced by refusal on the part of the excise board to grant saloon licenses for any place of business fronting on P street in that block, and that on this account it had a direct pecuniary interest in urging that the license in question be refused. We cannot presume, however, that the excise board was unduly influenced by this consideration. It is well known that the general government has expended a large amount of money in erecting a post office and court house on the Government Square facing on P street between Ninth and Tenth streets; that one entrance to the building faces on P street; that the citizens of Lincoln, in large numbers, many of them women and children, daily visit the post office; that many of the employees of the State Journal Company are young women, and, as before stated, it is abundantly shown that for a year previous to the petitioners' application the excise board, which was then composed of the same members which made up the board when petitioner's application was made, had declared a policy of refusing to license any saloons on the north, east and west side of the Government Square; that the approach to the government building and the streets leading thereto should not be obstructed by those who usually patronize the saloon, nor the sight or hearing of women and children visiting the post office be shocked by scenes or expressions coming from those under the influence of intoxicating drink, and whose sense of decency and propriety might be obscured on that account. That the excise board has a discretion in limiting the number of saloons, or in prohibiting their operation in any locality where reasonable grounds exist for such action, is manifest from what is said in *In re Jorgensen*, 75 Neb. 401. The opinion of Chief Justice HOLCOMB in that case contains the following language: "There are places in every city wherein the number of saloons should be restricted. Many reasons for such restrictions readily suggest themselves and we need not, it would seem, enter into a discussion of any of them.

This right of limitation as to numbers was distinctly recognized in *State v. City of Alliance,* 65 Neb. 524."

The members of the excise board have, in our opinion, acted in this matter, not in any capricious spirit, but in accordance with their best judgment, and after mature consideration. For more than a year the members of the board had considered the advisability of prohibiting saloons in the locality where the applicant wished a license to continue his business another year. When granted his last license, he was notified that saloons would not be allowed in the building he was then occupying in the future. It is fairly to be presumed from what appears in the record that the board in licensing the applicant and others to conduct saloons at the locality named during the year 1906 were governed largely by the consideration that it would be a hardship to refuse a license without giving the applicants ample time to find another location, or to dispose of the property which the nature of their business required. With commendable candor the members of the board have made of record the reasons moving them to refuse a license to the applicant, and this, as intimated by one of the members in explaining his vote, in order that the question of the right to refuse a license under the circumstances attending the case might be decided, and the authority of the board and the rights of applicants under similar circumstances finally settled. If, therefore, we wholly disregard the protest filed by the State Journal Company and the evidence offered in support thereof, we still find ample support for the board, in the reasons given and placed of record on the minutes of the board, for its action in this case. The board was governed in its action, not by any whim or caprice, or by any personal objection which its members had to the applicant, but, as fairly stated in the record which it made, its refusal to license a saloon in the block in question extends not alone to the plaintiff, but to every one who might apply for a license in that locality. The applicant was not denied a privilege which the board

proposed to extend to others. The privilege which he was denied was denied to every other applicant.

The record does not show any abuse of the discretion vested in the board, and we recommend an affirmance of the judgment of the district court.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

IN RE GUS A. JUGENHEIMER.
IN RE GLEN JOHNSON.

FILED JUNE 4, 1908. Nos. 15,357, 15,358.

1. **Intoxicating Liquors:** LICENSE: DISCRETION OF BOARD. The excise board of a city is vested with a wide discretion in the matter of granting licenses for the sale of intoxicating liquors.
2. ———: ———: ———. Such discretion extends to limiting the number of licenses which it will issue for the sale of liquors within the city, as well as the number that will be granted for any particular locality.
3. ———: ———: ———. This is especially true where, as in the city of Lincoln, the board is charged with policing the city and maintaining peace and good order therein, but is limited in the number of officers which it may appoint and maintain for this purpose.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Judgment of district court reversed: Order of excise board affirmed.*

John M. Stewart and *T. F. A. Williams,* for appellants.

Edwin Murfin and *T. J. Doyle, contra.*

DUFFIE, C.

The records in the cases above entitled disclose the following facts: June 4, 1907, Jugenheimer filed with the

excise board of the city of Lincoln his application for license to sell intoxicating liquors at No. 1119 P street, and on June 5, 1907, Johnson filed a like application with said excise board for a license to sell intoxicating liquors at No. 319 North Ninth street. At a special meeting of the board held on June 13, 1907, the following was adopted: "Whereas 35 (licenses) have already been granted for the sale at retail of spirituous, vinous and malt liquors during this municipal year in the city of Lincoln, or about one licensed saloon to every 1,700 of our population, therefore be it resolved by the members of the excise board that it is the sense of this board that no further retail licenses be granted during this municipal year in excess of the number already granted. Voting Aye, Harpham, Powell. Nay, Brown." At a special meeting held July 6, 1907, the following proceedings were had relating to the application of Jugenheimer: "Resolved that the application of Gus A. Jugenheimer for a saloon license at No. 1119 P street, Lincoln, Nebraska, be, and the same is hereby, denied for the reason that 35 retail saloon licenses have already been issued in this city, some of which are near said location, and, upon careful consideration of the question, we believe that the public interest requires that no additional licenses be granted in this city, and particularly that none be granted at the location named for this municipal year. Voting Aye, Harpham, Powell. Nay, Brown." A similar resolution rejecting the application of Johnson for a license at No. 319 North Ninth street was adopted by the board. The applicants appealed to the district court, and the court reversed the action of the board, and ordered a license to issue to Johnson upon his paying the city treasurer the sum of $1,500 required by the rules and regulations of the board as a license fee. In the Jugenheimer case the court directed that the case be remanded to the board for further proceedings. From these orders of the district court, the city of Lincoln and the excise board have appealed to this court.

From a written opinion filed by the district judge, we quote the following: "Under the general ordinances or rules of the excise board providing for the granting of licenses, the courts have universally held that city authorities have no right to make an arbitrary discretion in granting licenses. They cannot grant the same to a favored few, and refuse it to another, who has in all respects complied with the ordinances and laws of the state, and who is deemed to be a suitable person for the transaction of such business, as it appears from the record in this case the applicant is. Municipal corporations are mere creatures of the legislative will, and can exercise no power except such as the state has conferred upon them. When the city authorities enter upon a policy of permitting traffic in intoxicating liquors, they open the way to all persons who are suitable under the provisions of the law to engage therein, and all applicants must be treated alike. If the excise board, having entered upon such policy of granting licenses to some, can curtail the number who shall be thus favored, such powers would be dangerous, and open the way to greater evils than would flow from the rule of 'equal justice to all people, and special privileges to none.' It is possible that, at the outset of the municipal or licensing year, had the city authorities declared a policy of limiting the number of saloons to 35 or less, and had permitted all persons desiring to enter into the traffic to file their applications, and had then found some fair and equitable way to select from the number of applicants those the authorities deemed best fitted to engage in the business, the law might sustain such a proceeding; but that question is not before the court from the record presented in this case." We have set forth so much of the opinion of the trial judge as shows the reasons which governed him in reversing the action of the board, both in fairness to him, and because it fairly presents the contentions of the applicants that, where the excise board of a municipality adopts the policy of licensing the sale of intoxicating

liquors, it has no discretion in limiting the number who may engage in the business, but must license all applicants who meet the requirements of our statute and the rules of the board, however great the number may be, and regardless of the wants of the community in that respect.

In times not very remote little more restriction was thrown about the business of liquor selling than about any other business. The evils of the traffic finally became so pronounced that it presented to the legislature the problem of satisfying the demands for the sale of intoxicants, and at the same time minimizing the well-understood evils of the traffic. In the leading case of *Pleuler v. State,* 11 Neb. 547, Judge LAKE, in discussing this question, said: "The leading motive of the legislature in enacting the law could not have been the raising of revenue, but rather to thoroughly regulate, and as far as practicable suppress a traffic, the tendency of which was believed to be productive of pauperism, vice, misery, and crime, to the great injury of the people of the state at large, and especially of the particular locality where it is carried on." The solution made by the legislature is found in the provisions of the Slocumb law (Ann. St. 1907, secs. 7150-7199*a*) which makes the sale of intoxicating liquors unlawful by any person not licensed to conduct the business. We start out, therefore, with the facts before us that, until a party has secured a license, he has no right to engage in the sale of intoxicating liquors, and that no one has an absolute right to a license, but must submit his claim therefor to the judgment and discretion of the excise board. The rights of the citizens in this respect are so well set forth by Mr. Justice Field in *Crowley v. Christensen,* 137 U. S. 86, that we quote somewhat at length from the opinion in that case: "It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession

and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy and dispose of property is declared in the constitutions of several states to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any state from passing laws respecting the acquisition, enjoyment and disposition of property. What contracts respecting its acquisition and disposition shall be valid, and what void or voidable; when they shall be in writing and when they may be made orally; and by what instruments it may be conveyed or mortgaged are subjects of constant legislation. And, as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non lædas* is a maxim of universal application. For the pursuit of any lawful trade or business, the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business. Some occupations by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them, require regulations as to the locality in which they shall be conducted. Some by the dangerous character of the articles used, manufactured or sold require, also, special qualifications in the parties permitted to use, manufacture or sell them. All this is but common knowledge, and would hardly be mentioned were it not for the position often taken, and vehemently pressed, that there is something wrong in principle and objectionable in similar restrictions when applied to the business of selling by retail, in small quantities, spirituous and intox-

icating liquors. It is urged that, as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation. There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement, which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery in society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the state is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by

retail; it is not a privilege of a citizen of the state or of a citizen of the United States."

In *Jugenheimer v. State Journal Company, ante,* p. 830, we did not enter upon any discussion of the discretionary powers of the board in granting or refusing a license, for the reason that, in our judgment, the facts in that case were an ample justification for the action of the board. In the cases now under consideration the question of how far the board may exercise a discretion in refusing a license is squarely presented, and, while the board has recited in its record that one reason for its action in the present cases is that no license should be issued for conducting a saloon at the places named by the applicants, we will proceed to determine these appeals upon the theory adopted by the district court—that the primary cause for the refusal of the licenses was the fact that the board had determined to limit the saloons to 35 in number. It has already been determined that the excise board may, in the exercise of a sound discretion, limit the number of saloons in any certain locality of the city. *In re Jorgensen,* 75 Neb. 401. The question whether we shall go a step further, and hold that the excise board may, in its discretion, limit the number of saloons in the city, is the question now presented. On the part of the applicants it is urged that, having adopted the policy of licensing saloons in the municipality, the excise board have no discretion in limiting the number, but must issue a permit to every person applying therefor, assuming always that they have complied with the requirements of the statute and the rules of the board; that, when these requirements have been met by the applicant, the business of selling intoxicating liquors must, like all other branches of business, be open to every one, and that the applicant himself is the only judge of whether the popular demand for liquor will be supplied by those already licensed, or whether more saloons are required and desirable. On the other hand, it is argued by the appellants that the excise board has a wide discretion in saying

what number of saloons may be operated in the city, and that, when this discretion has been fairly and judiciously exercised, the courts cannot interfere to control it.

An extended examination of the authorities favors the contentions of the appellants. It is almost universally held that the object of a statute, such as the Slocumb law (Ann. St. 1907, secs. 7150-7199*a*), was not to convert the courts into excise boards, but merely to require a review of their action where an application for a license has been arbitrarily denied, or denied without good or solid reasons therefor. It has been said that the board, with its facility for inquiry by evidence or otherwise, is peculiarly qualified to pass upon the question of the propriety of issuing or refusing a license in a given case, and that its findings should in all but extreme cases meet with approval; that the legislature has lodged such discretion with the board, and it should remain there, except in a clear or in an extreme case of abuse. *In re Excise License,* 38 N. Y. Supp. 425. The question we are considering was determined by the supreme court of New York in *People v. Bennett,* 23 N. Y. Supp. 695. In the body of the opinion it is said: "I am not prepared to say that commissioners of excise may not, in the exercise of their discretion, limit the number of licenses granted by them, and refuse to issue a license, because there are already a sufficient number of places and persons licensed to sell liquor in their town, and therefore decide that additional license is not needed." In *Gross's License,* 1 Super. Ct. Rep. (Pa.) 640, the licensing board made the following record: "Taking into consideration our personal knowledge and information in this case, as we are required to do in most applications, we have determined that another licensed place in Sunbury is unnecessary, and therefore refuse the license." This was a legal reason, and not subject to review by the appellate court. In *State v. Common Council,* 94 Minn. 81, the following was held: "The question whether a license for the sale of intoxicating liquors shall be granted to an applicant

therefor within the city of Northfield rests in the sound judgment and discretion of the common council, in the exercise of which they act judicially, and not ministerially, and their action cannot be controlled or reviewed by mandamus. The council may, if in its judgment the best interest of the inhabitants of the city demand it, limit the number of saloon licenses to be granted." In the body of the opinion it is said: "The provisions of the charter vest in the common council authority to regulate and control the sale of intoxicating liquors within the city, and in exercising that authority the council is clothed with discretionary powers, the exercise of which cannot be controlled by the courts. The power to regulate and control includes the power to do all that is deemed, in the judgment of the council, for the best interests of the municipality and its inhabitants. It necessarily confers the power to refuse a license, or to limit the number of licenses to be granted, when, in the judgment of the council, the welfare of the city suggests such action." In the *Jorgensen* case, Judge HOLCOMB, who wrote the opinion, and who was also the author of the opinion in *State v. City of Alliance*, 65 Neb. 524, said: "Can it be said that the board's position in refusing the license in the case at bar is untenable, and that it acted arbitrarily in respect of the matter, for the reasons stated? We are unable to say from the record that such is the case. The presumption ought to be indulged in that the action was taken in good faith and from right motives, and with the view of best conserving public interest. We are not warranted in drawing other inferences from the record before us. The rule adopted appears to operate on all alike. Its object is to limit the number of saloons in a certain locality. * * * That such a limit is required in the interests of law and order, and their due and orderly enforcement, must, we think, be accepted upon the mere statement of the proposition. * * * This right of limitation as to the numbers was distinctly recognized in *State v. City of Alliance*, 65 Neb. 524."

If the power to limit the number of saloons in any one locality of the city should be extended to the board in the public interest, the same considerations require us to go one step further and say that the discretion of the board should extend to determining and limiting the number of saloons that may be allowed to do business in the city. While we are supported in this holding by the weight of authority, there are other reasons for so holding in this state, which, so far as our examination has extended, do not exist, or at least have not been referred to in the opinions cited from other states. Section 7963 Ann. St. 1907, which gives to the excise board exclusive control of the licensing and regulation of intoxicating liquors, also makes it the duty of that board to appoint the chief of police and the police force of the city. That part of the section referred to is in the following language: "The excise board shall have power and it shall be their duty to appoint a chief of police and such number of policemen and other officers as may be necessary to police the city, and protect persons and property and maintain peace and good order; provided, however, that the excise board is limited in the number of such appointees to such number as shall require, in payment of salaries, the expenditure of the funds provided for such purpose by the mayor and council; and provided, further, that the number of policemen so appointed shall not exceed one to every 2,500 of population." The peace and good order of the city is committed to the care of this board. The number of police that may be appointed for this purpose is limited to one officer to every 2,500 of the population, and is further limited by the funds which the mayor and council may provide for the payment of the force. Experience in municipal affairs has demonstrated that increasing the number of saloons in a municipality beyond the reasonable wants of the people tends greatly to increase lawlessness and to make the administration of law and the preservation of order more difficult. The normal trade of any community will furnish patronage for a certain number

of saloons. When the number is increased beyond that required to satisfy the normal demand, the saloon-keepers are compelled, in order to make the business profitable, to resort to all manner of vices to create an artificial demand for liquor and an increase in the consumption of liquor beyond the normal. The evil consequences flowing from these practices, and the increased difficulty in the preservation of peace and order and the enforcement of law caused by such a situation can be readily seen. If the public is to have any protection from an undue multiplication of saloons in a city, there must be vested somewhere the power to limit the number; there must, if the public interests in this respect are to be guarded, be power vested in the body granting the license to determine what the public interests require, as to the number of licenses, as well as the places where the traffic in intoxicating liquors may be conducted. To say to the board that it shall be responsible for the peace and good order of the city, and then to limit the number of officers it may appoint for that purpose, and deny it the widest discretion in limiting the agency most productive of lawlessness, is a condition which the legislature never contemplated, and which the courts should not approve. It is obvious that the number of saloons, where disorder is most likely to arise, should, to a certain extent, be measured by the means placed at the disposal of the board to police the city and preserve order. While it might be better to formulate a rule limiting the number of saloons prior to the time set for applying for a license, and then to devise some equitable way in which the licenses shall be awarded, we cannot say that the failure of the board to proceed in this manner is so objectionable as to require a reversal of its action. It is manifest that the board could not beforehand anticipate or know the number of applicants who would apply for a license. If the number of applicants were less than the board thought requisite to supply the normal demand, all could be accommodated; but, when it became evident that the applications were in excess of the number required, there was but

one course to pursue, which was then adopted by the board, to refuse all applicants who applied thereafter.

One other question demands our consideration. The city of Lincoln and the excise board perfected this appeal from the judgment of the district court reversing the action of the board in refusing licenses to the applicants. It is now insisted that the excise board is not a proper party to the appeal; that to allow the excise board to take an appeal in support of its own order would, in principle, be like allowing a court to appeal from the judgment of an appellate court reversing its decision. It must be remembered, however, that the excise board performs public functions of vital consequence to the city. In the exercise of these functions the discretion granted it by the state has been set aside by the district court. If the city or the excise board cannot appeal, who can question the action of the district court? If the board cannot appeal, then it is within the power of the district court to determine the number of saloons that may be conducted in any municipality. In the case of *People v. Sackett*, 44 N. Y. Supp. 593, one Thomas appealed to the court from an order made by Sackett, as county treasurer, refusing him a liquor license, and the order was reversed by the court to which an appeal was taken. Sackett appealed from the order of the court reversing his finding, and it was urged, as here, that Sackett had no appealable interest. The appellate court said: "The county treasurer, by that order, is directed to do an act which, as a public officer, he is not authorized to do; and, although it does not affect him pecuniarily, he has such an interest in the subject as to make him a party aggrieved, within the meaning of section 1294 of the code." In *People v. Jones*, 110 N. Y. 509, the court of appeals held that, when the action of the land commissioners was reversed, they could appeal. In the opinion it is said: "That decision interferes with them in the discharge of their duties. * * * It is their duty, representing both public and private interests, to defend any determination which they have made and

which they believe to be right. * * * While, therefore, they did not have any property or pecuniary interest in the matter in controversy, they were, nevertheless, we think, in a legal sense aggrieved by the decision appealed from. That officers thus situated may be both appellants and respondents upon appeals to this court is shown by the uniform practice for many years." Other cases in support of this view are cited in the opinion. Section 7153, Ann. St. 1907, provides for an appeal in this class of cases by any party feeling himself aggrieved by the decision in the case. We have no doubt that by the reversal of its decision, and by the order of the district court to issue a license in one case, and to reconsider its action in the other, the excise board was, within the meaning of the statute, "an aggrieved party," and entitled to appeal.

In our judgment the order of the district court should be reversed, and the order of the excise board affirmed.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the order of the excise board affirmed.

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5. Subd. 4, sec. 5328, Ann. St. 1907, authorizes divorce for desertion only where wilfully continued for a period of two years. *Kirkpatrick v. Kirkpatrick*..... 627
6. Where the wife abandons the husband without just cause, and thereafter becomes insane, a cause of action for divorce does not accrue until two years, exclusive of the time she is insane. *Kirkpatrick v. Kirkpatrick*..... 627
7. A court has authority, on application of either parent and notice to the other, to alter a decree of divorce so far as it relates to the care, custody or maintenance of children. *Connett v. Connett*..... 777
8. The parents cannot by agreement, nor can the court by order, in a divorce suit irrevocably determine the amount the father shall contribute for the support and education of his children, so as to divest the court of power to alter the decree in the interest of the children. *Connett v. Connett* 777
9. The wife's alimony and the children's maintenance, if included in the same decree, should be separated into distinct items, and not included in one sum. *Connett v. Connett*.... 777

Dower.

1. Antenuptial contracts were void at common law, and did not constitute a bar to dower. *Rieger v. Schaible*..... 33
2. Secs. 12-18, ch. 23, Comp. St. 1897, providing that a jointure is a bar of dower, do not ordinarily deprive the intended wife of the power to bar her dower by any other form of antenuptial contract. *Rieger v. Schaible*..... 33
3. An antenuptial agreement *held* sufficient, when equitable in its terms and entered into in good faith, to constitute an equitable bar to dower. *Rieger v. Schaible*..... 33

Drains.

One whose land is traversed by a drainage ditch constructed under secs. 5500-5527, Ann. St. 1907, may recover the value of the land taken therefor, with special damages to the remainder of his land, but he cannot recover in such pro-

Drains—*Concluded.*

ceeding the damages he may have theretofore sustained by the neglect of the county to keep a previously established ditch in a suitable condition. *Gutschow v. Washington County* 275

Ejectment.

The heir may maintain ejectment against a stranger during administration, or against a grantee of the executor where the executor has no power to sell. *Clark v. Fleischmann*... 445

Embezzlement. See INDICTMENT AND INFORMATION, 1.

Estoppel. See INSURANCE, 6.

Evidence. See APPEAL AND ERROR. TAXATION, 11.

1. A jury cannot disregard the corroborated evidence of an impeached witness, but may give it the weight it is entitled to. *Johnson v. Johnson* 60
2. A statement by defendant or his servant that he had served a certain mild drink to deceased is inadmissible as a part of the *res gestæ* in an action for the wrongful killing of deceased by the sale to him of intoxicating liquors. *Young v. Beveridge*..... 180
3. A statement of a witness as to the probable effect of a drink of liquor is inadmissible to prove the nature of the liquor, but its admission is not error if it was a part of a conversation properly admissible. *Young v. Beveridge*..... 180
4. Witnesses who were acquainted with a person may testify with reference to his ability to perform manual labor. *Young v. Beveridge*..... 180
5. The understanding of a witness derived from language used is not competent evidence, but the language should be detailed. *Odell v. Story*..... 437
6. In a suit for damages for deceit in a sale of land, the opinion of a witness as to the amount of damages is not competent evidence, that being a question for the jury. *Odell v. Story*..... 437
7. In an action for the price of machinery sold on a written order, the vendee can prove that the order was given on oral representations of the vendor that the machinery would do good work, and that it failed to do so. *Fairbanks, Morse & Co. v. Burgert*..... 465
8. The declaration of the payee of a note, not a party to the action, is inadmissible against the purchaser to disprove his ownership. *Piper v. Neylon*..... 481
9. The owner of a stock of goods and witnesses acquainted with its value may give their opinion of such value. *Jensen v. Palatine Ins. Co*..... 523

Evidence—*Concluded.*

10. The scope of expert evidence *held* to extend to any subject in which one may derive by experience special knowledge. *Maxson v. Case T. M. Co.* 546

11. Where, in addition to a receipt, a paper contains a contract, it cannot be varied by parol in the absence of fraud. *Waters v. Phelps* 674

12. Admissions made out of court by a conspirator after the complete execution of the conspiracy are not admissible against his coconspirator. *State v. Merchants Bank* 704

13. Admissions of a conspirator are not admissible against his coconspirator, unless there is other evidence tending to prove conspiracy. *State v. Merchants Bank* 704

14. It is not necessary to call expert witnesses to give opinions as to whether a railroad was negligent in constructing and maintaining its roadbed. *Morse v. Chicago, B. & Q. R. Co.* .. 745

15. A judicial record, if properly certified, is admissible to prove its existence. *Sheibley v. Fales* 795

Execution.

1. Where several articles of mortgaged property are seized on execution, in the absence of any direction by the mortgagor, the property should be sold *en masse* subject to the mortgage. *Knutson v. Rosenberger* 761

2. Where several articles of mortgaged property are seized on execution, and the mortgagor insists that they be sold separately, such action supports a finding that he consented to a sale free from the mortgage, and to its payment from the proceeds. *Knutson v. Rosenberger* 761

Executors and Administrators. See PARTNERSHIP, 1.

1. An antenuptial contract made in good faith *held* sufficient to bar the widow's statutory allowance; the rights of children not being involved. *Rieger v. Schaible* 33

2. An appeal lies from the judgment of the probate court granting or refusing an allowance to a widow. *Rieger v. Schaible* 33

3. A deed to all the lands of a decedent *held* proper evidence to show that decedent had knowledge of a claim against him, and as tending to establish the claim against his estate. *Gandy v. Estate of Bissell* 102

4. While on a trial in the district court of a claim against a decedent's estate evidence of the date when such claim was filed and the last date for filing claims may be proper, it is not proper to submit copies of the proceedings in the probate court. *Gandy v. Estate of Bissell* 102

Fees.

1. Statutes giving fees are construed strictly, and will not be extended by implication. *Downey v. Coykendall*..... 648
2. Where a complaint is filed against several persons, the same fees should be charged as if there were but a single defendant, until demand is made for separate trials; and then fees should only be charged for extra duties. *Downey v. Coykendall* 648

Fraud. See PLEADING, 9, 10.

1. Questions of fraud must be raised by suitable pleadings. *In re Estate of Nelson*..... 363
2. Where the owner has pointed out to his vendee land which he did not own as land which he proposed to sell, and has conveyed to him land of less value than that pointed out, the vendee may recover the difference in their value. *Odell v. Story*..... 437
3. In an action to recover the value of goods exchanged for a contract in land, evidence *held* to sustain verdict for plaintiff. *Williams v. Wightman*..... 678
4. A suit against a receiver for fraud in procuring an assignment of a creditor's claim, *held* not controlled by secs. 602, 609 of the code, relating to the manner and time for the vacation of judgments. *State v. Merchants Bank*..... 710
5. A creditor of a bank *held* entitled to recover from the receiver for deceit. *State v. Merchants Bank*..... 710

Grand Jury.

1. Since the enactment of sec. 584 of the criminal code, no grand jury can be lawfully organized, unless its selection and impaneling has been previously ordered by a judge of the district court for the county in which it is to act. *Ellis v. State*..... 284
2. Such order must be in writing and filed with the clerk of the district court on or before the day fixed by law for the drawing of jurors. *Ellis v. State*..... 284

Homestead.

1. Presumption of abandonment of a homestead does not obtain where the owner moves with his family to a new home purchased in the capital city for the sole purpose of performing his official duties, while such owner retains the continuing intention to return to the old home. *Allen v. Holt County*..... 198
2. The sale of a homestead under an ordinary execution during the temporary absence of the owner is void. *Allen v. Holt County* 198

Homestead—*Concluded.*

3. A homestead cannot be aliened or incumbered except by a written instrument executed and acknowledged voluntarily by both husband and wife. *Thompson v. Foken*..... 261

Homicide.

1. Where a mortal wound is unlawfully inflicted under such circumstances that, if death had immediately ensued, it would have been a felonious homicide, the fact that the treatment of the victim may have contributed to his death will not relieve the accused. *Hamblin v. State*..... 148
2. Assaults committed prior to the time of the crime *held* to afford no defense to the charge of murder, the essential elements of the crime having been found by the jury to exist at the time deceased was killed. *Maynard v. State*... 301
3. Error in the exclusion of evidence *held* waived. *Maynard v. State*..... 301
4. An instruction *held* not erroneous in the use of the term "common assault and battery," without further definition of "assault and battery." *Maynard v. State*..... 301
5. Instruction as to the effect of intoxication *held* not prejudicial. *Maynard v. State*..... 301
6. Instruction defining "malice" *held* not erroneous. *Maynard v. State*..... 301
7. An instruction on self-defense *held* not erroneous. *Maynard v. State*..... 301

Husband and Wife.

Antenuptial contracts between persons contemplating matrimony, determining the prospective rights of each in the property of both parties during and after marriage, are not against public policy and are enforceable. *Rieger v. Schaible*..... 33

Incest.

1. On a trial for incest, evidence may be received of other criminal acts of the same nature anterior to the time the crime is charged to have been committed. *Smothers v. State*..... 426
2. An instruction that prosecutrix was not an accomplice, and that if the jury were satisfied beyond a reasonable doubt of the truth of her evidence it might convict, *held* correct. *Smothers v. State*..... 426
3. Under the facts *held* not error to allow evidence that a child born after marriage was the result of incestuous intercourse. *Smothers v. State*..... 426

Indictment and Information.

1. The rule that averments of time in an information are mere matters of form, and that the date need not be proved as laid, does not apply to a prosecution under secs. 33, 227, ch. 12*a*, Comp. St. 1907, against a clerk of the police court for failure to pay over within 30 days of collection all fines that come into his possession, where the offense is alleged to have been committed at a time when there was no obligation to account. *Grier v. State*..... 129
2. Where it is alleged that the accused committed a certain single act on a definite day and in a certain place, a later charge that he then and there did, or omitted to do, some other act with reference to the first one is equivalent to charging one transaction at the same time and place. *Grier v. State* 129
3. Forging and fraudulently uttering and publishing the same instrument by the same person constitutes but one crime, which may be charged in a single count of an information. *State v. Leekins*..... 280
4. Under ch. 108, laws 1885, the requirement that all informations shall be filed during term is mandatory. *Cubbison v. Beemer*..... 824

Injunction. See MONOPOLIES, 2.

Petition against village trustees *held* not to state a cause of action for equitable relief. *Bishop v. Huff*..... 729

Insane Persons.

1. The heirs apparent or presumptive, or those dependent on an alleged incompetent person for support, may appeal from an order of the county court dismissing their petition for the appointment of a guardian for such incompetent. *Tierney v. Tierney*..... 193
2. Sec. 9637, Ann. St. 1903, does not authorize a county to recover from the estate of an insane person costs and expenses paid by the county, incident to the examination of such person before the commissioners of insanity and to his commitment and transportation to the hospital for the insane. *Kearney County v. Elsam*..... 490

Insurance.

1. Sec. 6638, Ann. St. 1903, relative to mutual accident insurance companies, *held* to require the consent of the corporation, notwithstanding the by-laws provide that a beneficiary may be changed on the written application of the member to the secretary. *Urick v. Western T. A. Ass'n*..... 327
2. Certain negotiations *held* insufficient to effect a change of beneficiaries. *Urick v. Western T. A. Ass'n*..... 327

Insurance—*Concluded.*

3. Declaration of the officers of a mutual insurance company fixing the amount of benefits less than that provided by the contract and by-laws is not a part of the contract. *Urick v. Western T. A. Ass'n*..... 327

4. Mutual fire insurance companies organized under ch. 45, laws 1897, are not authorized to transact reinsurance business. *Allison v. Fidelity Mutual Fire Ins. Co*..... 494

5. A contract of reinsurance made by a mutual insurance company organized under ch. 45, laws 1897, is *ultra vires*, and assessments cannot be collected on such policy. *Allison v. Fidelity Mut. Fire Ins. Co*..... 494

6. In an action by one insurance company against another, both of which were organized under ch. 45, laws 1897, to recover assessments on policies of reinsurance, the reinsured company is not estopped from pleading the defense of *ultra vires*. *Allison v. Fidelity Mut. Fire Ins. Co*..... 494

7. Where the value of goods destroyed exceeds the amount of insurance thereon, the making by assured, after loss, of an affidavit in which the value is overstated, *held* not to constitute a defense. *Jensen v. Palatine Ins. Co*..... 523

8. A provision of an insurance policy that assured shall, in case of loss, submit to an examination, *held* waived by a denial of liability. *Jensen v. Palatine Ins. Co*..... 523

9. A provision in an insurance policy that it is payable 60 days after notice and proof of loss is waived by conduct dispensing with proof of loss, and in such case interest should be computed from date of loss. *Jensen v. Palatine Ins. Co*..... 523

10. A stipulation for the forfeiture of an insurance policy is waived by conduct of the insurer inconsistent with his right or intention to claim such forfeiture. *Jensen v. Palatine Ins. Co*..... 523

11. In determining the financial condition of an insurance company organized under the natural premium or mutual assessment plans, its probable income from premiums on policies must be considered. *Dempster v. Opocensky*..... 612

12. Sec. 6476, Ann. St., does not make the procuring of securities, nor the depositing thereof with the state auditor, conditions precedent to doing business by an insurance company. *Dempster v. Opocensky*..... 612

13. Different writings may constitute a single contract of insurance. *Dempster v. Opocensky*..... 612

Interest. See DAMAGES, 7. JUDGMENT, 8.

Intoxicating Liquors. See CRIMINAL LAW, 16, 17.

1. In an action for damages from a sale of intoxicating liquors by a servant, that defendant had directed his servant not to sell intoxicants to the person injured is no defense. *Young v. Beveridge*..... 180

2. In an action by a widow for herself and minor child against a liquor-dealer for the wrongful killing of her husband, the measure of damages stated. *Young v. Beveridge*..... 180

3. In an action under the law governing sales of intoxicating liquors where death results, loss of means of support is not the only damage for which a recovery may be had *Murphy v. Willow Springs Brewing Co*..... 219

4. Where damages are sustained by an individual in consequence of the liquor traffic, under secs. 15-18, ch. 50, Comp. St. 1907, the action is properly brought by the party entitled to such damages. *Murphy v. Willow Springs Brewing Co*... 219

5. A father suffers a direct pecuniary loss by the death of his son, and he may sue the seller of liquors for his son's death resulting from such sales. *Murphy v. Willow Springs Brewing Co*..... 219

6. Damages sustained by an individual in consequence of the liquor traffic are, under sec. 15, ch. 50, Comp. St. 1907, recoverable notwithstanding death follows the injury; and the action is properly brought by the party entitled to such damages. *Murphy v. Willow Springs Brewing Co*..... 223

7. A count alleging a joint sale of intoxicating liquors to two persons is not sustained by evidence showing separate sales to each of them. *Yeoman v. State* 244

8. A licensing board may grant a license to be issued on the payment of the fee. *Seele v. Phelps*..... 690

9. An application for a liquor license will not be rejected because the officer with whom it was filed removed, making it impossible for the public to see the application, unless that fact was prejudicial. *Seele v. Phelps*..... 690

10. It is not an abuse of discretion for an excise board to refuse a liquor license in the near vicinity of the post office and United States courthouse, or where women and children, in large numbers, daily go for business or other proper purposes. *Jugenheimer v. State Journal Co*..... 830

11. Excise boards are vested with a wide discretion in granting liquor licenses. *In re Jugenheimer*..... 836

12. The discretion of an excise board extends to limiting the number of licenses it will issue in the city, as well as the number for any particular locality. *In re Jugenheimer*..... 836

Intoxicating Liquors—*Concluded.*

13. Where an excise board is charged with policing the city and maintaining order, but is limited in the number of officers which it may appoint, it has a broad discretion in limiting the number of liquor licenses. *In re Jugenheimer*..... 836

Judges.

1. A district judge is disqualified from confirming a judicial sale in an action which he prosecuted to judgment as attorney for plaintiff. *Harrington v. Hayes County*..... 231
2. A police judge sued under sec. 34, ch. 28, Comp. St. 1907, for taking excessive fees cannot justify by showing that he acted under the direction of the prosecuting attorney. *Downey v. Coykendall*..... 648
3. Sec. 34, ch. 28, Comp. St. 1907, imposing a penalty for the collection of excessive fees, applies to police judges. *Downey v. Coykendall*..... 648

Judgment. See DIVORCE, 3. FRAUD, 4. PLEADING, 14.

1. Affidavit to open a judgment, under sec. 82 of the code, in the form of a petition verified on belief, by the attorney of a nonresident, *held* insufficient, especially where it fails to show that the attorney had personal knowledge of the facts. *Cass v. Nitsch*..... 228
2. In proceedings to revive a dormant judgment, where the debtor pleads payment, a presumption of payment arises, which the judgment creditor must rebut. *Platte County Bank v. Clark*..... 255
3. Unless a witness having knowledge of the fact testifies to the nonpayment of a dormant judgment, it is incumbent on the judgment creditor to rebut the presumption of payment by proof of facts or circumstances. *Platte County Bank v. Clark* 255
4. Evidence in proceedings to revive a dormant judgment *held* not to repel the presumption of payment. *Platte County Bank v. Clark*..... 255
5. Rules stated under which judgment *nunc pro tunc* may be entered. *Clark & Leonard Inv't Co. v. Rich*..... 321
6. Entry of judgment *nunc pro tunc* will not be allowed to the prejudice of a third party who has become the owner of the property which will be affected by the order, and such party may ist the entry of such judgment. *Clark & Leonard Inv't Co. v. Rich*..... 321
7. A judgment by a county court on default, in the absence of both parties, when a case is reached for trial, though irregular, is not void. *Pitman v. Heumeier*..... 338
8. Under sec. 6727, Ann. St. 1903, a judgment draws 7 per cent.

Judgment—*Concluded.*

interest, though founded on a contract providing a less rate. *Portsmouth Savings Bank v. Yeiser*..... 343

9. A petition defective in substance will support a judgment if the court has authority to grant the relief and the basic facts are intelligibly set forth. *In re Estate of Nelson*..... 363

10. A judicial order or judgment cannot be attacked collaterally unless affected by some jurisdictional infirmity. *In re Estate of Nelson*..... 363

11. A judgment in favor of a county against its clerk for fees improperly retained may be introduced in an action between the clerk and a resident taxpayer as evidence of the shortage. *Sheibley v. Fales*..... 795

Judicial Sales.

An order confirming a judicial sale is a judicial, and not a ministerial, act. *Harrington v. Hayes County*..... 231

Jury.

1. The opinion of a juror as to the liability of defendant for damages in other cases is not of itself a cause for challenge. *Smith v. Chicago, B. & Q. R. Co*..... 186

2. The ruling on a challenge of a juror for cause will not be disturbed unless an abuse of discretion is shown. *Bemis v. City of Omaha*..... 352

3. The trial court in determining the qualification of a juror is not confined to his answers, but may consider his demeanor. *Bemis v. City of Omaha*..... 352

4. Proceedings before the state board of health to revoke a physician's license are triable without a jury. *Munk v. Frink* 631

Justice of the Peace.

Under sec. 1092 of the code, so long as the necessary absence of a justice continues, the justice called in retains jurisdiction to act, including the filing and approval of an appeal bond and the making of a transcript. *Carmichael v. McKay*.... 725

Libel and Slander.

1. A candidate for public office may be freely criticised, but a false charge of facts amounting to moral turpitude is libelous. *Sheibley v. Fales*..... 795

2. Published article *held* not directly nor by implication to charge embezzlement, perjury or subornation of perjury. *Sheibley v. Fales*..... 795

3. In a civil action for libel defendant may, where the charge is specific, answer that it is true; but, where the charge is in general terms, the answer must allege the facts on

Libel and Slander—*Concluded.*

which he relies to establish the truth of the charge. *Sheibley v. Fales* 795

4. An answer justifying the publication of a libel as the truth is sufficiently specific if it gives notice of what defendant will attempt to prove. *Sheibley v. Fales*..... 795

5. In an action for libel, *held* not error to instruct the jury to consider whether defendant had good ground to believe and did believe the statements he made were true. *Sheibley v. Fales* 795

6. That defendant did not personally investigate the truth of charges made by him will not conclusively establish his liability in a libel suit. *Sheibley v. Fales*..... 795

7. Evidence and instructions *held* not to exhibit prejudicial error sufficient to justify reversing judgment for defendant. *Sheibley v. Fales*..... 795

Limitation of Actions. See CRIMINAL LAW, 19, 20. PLEADING, 1, 2, 9, 10.

1. The statute of limitations runs against the title of a preemptor of public lands from the date he is entitled to a patent therefor, in favor of one who holds adversely. *Eastern Banking Co. v. Lovejoy*..... 169

2. Where defendant filled the channel of a creek and failed to provide a sufficient outlet for flood waters, causing damage to plaintiff's lots and mill, plaintiff's cause of action accrued at the date of the injury, and not at the time of defendant's acts. *McClure v. City of Broken Bow*..... 384

3. The substitution of a third party as plaintiff is not the commencement of a new action, and limitations are not available as a defense, if the original action was begun before the bar of the statute was complete. *State Bank v. Carroll*.. 484

4. A stipulation in a note that the payee may renew or extend it, without notice, and without prejudice to the right to enforce payment at any time, *held* not an agreement to waive the bar of limitations. *Allen v. Estate of Allen*..... 600

5. Where by the negligent construction of a railway embankment surface water is discharged on the land of an adjoining proprietor, his cause of action accrues at the date of the injury. *Morse v. Chicago, B. & Q. R. Co*..... 745

Lotteries.

The rule that courts will not permit the recovery of the consideration paid on an executed contract prohibited by statute does not apply to the vendee of a lottery ticket. *Becker v. Wilcox*..... 476

Mandamus.

1. Mandamus will lie to compel the secretary of state to receive statutes prepared under authority of the legislature as provided in ch. 193, laws 1907. *State v. Junkin*..... 118

2. A writ of mandamus will not lie to compel the state board of equalization to make a record of objections and requests for rulings; but such matters should, if desired, be preserved in a bill of exceptions. *State v. State Board of Equalization and Assessment*..... 139

3. Where the dean of a medical college has reported to the directors that a student has passed all examinations so as to entitle her to a diploma, and the directors arbitrarily refuse to issue it, a court will compel them to discharge their duty. *State v. Lincoln Medical College*..... 533

4. A corporation organized under sec. 15, ch. 16, Comp. St. 1905, is a private eleemosynary institution, and the duty cast by law upon its directors to graduate students who have complied with its regulations and course of study is a statutory duty which a court will enforce by mandamus. *State v. Lincoln Medical College*..... 533

Master and Servant. See PLEADING, 6.

1. In an action for wages, *held* that plaintiff was not estopped to claim the amount sued for. *United States v. Jobst*..... 11

2. Instructions in an action for injuries *held* justified by the evidence. *Henry v. Omaha Packing Co*..... 237

3. Where an agent in charge of cumbersome machinery employs an assistant, *held* that the person employed is not a volunteer or trespasser, but a servant. *Maxson v. Case T. M. Co*..... 546

Mechanics' Liens.

1. A subcontractor cannot extend the time within which he may file a mechanic's lien by donating material, nor by substituting proper material for defective lumber. *Ashford v. Iowa & Minnesota Lumber Co*..... 561

2. A subcontractor cannot acquire a lien for material not used nor delivered. *Ashford v. Iowa & Minnesota Lumber Co*.... 561

3. Where more than 60 days intervened between the items of an account used by a subcontractor as the basis for a mechanic's lien, it will be presumed that the items were furnished under separate contracts. *Ashford v. Iowa & Minnesota Lumber Co*..... 561

4. A small amount of labor performed or material furnished, without the owner's request, after he has unconditionally accepted a structure, and under circumstances indicating

Mechanics' Liens—*Concluded.*

bad faith, will not support a mechanic's lien. *Ashford v. Iowa & Minnesota Lumber Co*..... 561

5. Evidence *held* to sustain judgment that lien was not filed in time. *Ashford v. Iowa & Minnesota Lumber Co*..... 561

Monopolies.

1. An agreement between retail lumber dealers, whereby one dealer agrees to "protect" the other by asking a higher price than the other for the same bill of lumber submitted to both for prices, *held* in violation of the anti-trust law. *State v. Adams Lumber Co*..... 392
2. An agreement among a number of retail lumber dealers in a county to sell lumber and building materials within the county at certain fixed prices and to divide territory is illegal as in restraint of trade and competition, and will be enjoined. *State v. Adams Lumber Co*..... 392
3. Acts of secretary of the Nebraska Lumber Dealers Association *held* in violation of law as tending to prevent competition and in restraint of trade, and that the officers and directors of said association are chargeable with knowledge of such acts. *State v. Adams Lumber Co*..... 392

Mortgages. See PLEADING, 1, 2. RECEIVERS, 1, 2.

On motion for deficiency judgment against a grantee of premises, *held* that he had failed to show that a clause in the deed assuming a mortgage was inserted by mistake, without authority, and without consideration. *Hartsuff v. Parratt*.. 6

Municipal Corporations.

1. In an action against a city for personal injuries caused by the overturning of a billboard, *held* not error to admit evidence that at the time of and for 12 months prior to the injury the board was not securely braced. *Bemis v. City of Omaha*..... 352
2. Under sec. 22, ch. 12*a*, Comp. St. 1901, notice to a city, containing full particulars as to the nature and extent of either the accident or the injury, and time and place, *held* sufficient. *Bemis v. City of Omaha*..... 352
3. Whether a wind-storm that overturned a billboard, causing personal injuries, was an act of God, *held* a question for the jury. *Bemis v. City of Omaha*..... 352
4. Evidence in an action for injuries *held* to sustain verdict for plaintiff. *Bemis v. City of Omaha*..... 352
5. A city or village is not required to exercise the utmost care, but only reasonable diligence, to keep its sidewalks in a reasonably safe condition for the use of persons exercising ordinary care. *Strubble v. Village of DeWitt*..... 504

Municipal Corporations—*Concluded.*

6. Notice of injury from a defective street *held* not objectionable because it also contained a claim for damages for the injury. *Carson v. City of Hastings* 681

7. The sufficiency of a notice of the place of an injury is determined, not alone from the wording of the notice, but in the light of evidence of the surroundings. *Carson v. City of Hastings* 681

Negligence.

1. Contributory negligence is an affirmative defense, the burden of proving which is on the party pleading it. *Vertrees v. Gage County* 213

2. Where plaintiff's evidence discloses facts from which contributory negligence might be inferred, whether other evidence exculpates him, *held* a question for the jury. *Vertrees v. Gage County* 213

3. An instruction that plaintiff must prove his case by a preponderance of the evidence without disclosing negligence on his part, without the qualification that such negligence contributed directly to the injury, *held* reversible error. *Vertrees v. Gage County* 213

4. Evidence in an action for injuries *held* to require its submission to the jury. *Vertrees v. Gage County* 213

5. Evidence of repairs made or precautions taken after an injury is not admissible to prove antecedent negligence. *Pribbeno v. Chicago, B. & Q. R. Co* 657

6. A stock yards company that controls the pavement in its yards, and permits it to become out or repair, *held* liable to a salesman who is injured by reason of said defects. *Perrine v. Union Stock Yards Co* 790

New Trial. See APPEAL AND ERROR, 15, 23, 36.

1. A new trial will not be granted for newly discovered evidence, which is merely cumulative. *Kraus v. Clark* 575

2. Where a party forgets the presence of a witness to a conversation until after trial, he cannot obtain a new trial for newly discovered evidence. *Kraus v. Clark* 575

3. A new trial on the grounds of accident and surprise, *held* properly denied. *Pennington County Bank v. Bauman* 782

Nuisance.

The business of standing stallions and jacks for breeding purposes in a livery barn in a village, in proper condition, *held* not a nuisance. *Thatcher v. Deuser* 349

Parties. See INTOXICATING LIQUORS, 4-6.

1. Sec. 901 of the code does not authorize a party to intervene after trial has commenced, if prior thereto he had opportu-

Parties—*Concluded.*

nity to intervene and lost it by his laches. *Flint v. Chaloupka* 87

2. Where a right of action for injuries resulting in death depends on ch. 21, Comp. St. 1905, the action must be brought in the name of the administrator. *Murphy v. Willow Springs Brewing Co*..... 223

Partnership.

1. On the death of a partner the partnership assets, both real and personal, pass to the surviving partner. *Clark v. Fleischmann* 445

2. A verbal agreement between two persons to purchase jointly a city lot, where one buys the land, paying the purchase price and taking title in himself, *held* not to constitute a partnership. *Mancuso v. Rosso*..... 786

Party Walls.

1. Where a wall is on the property of one party, the right of an adjoining owner to have support therefrom, whether derived from contract or acquired by prescription, is in the nature of an easement, which is terminated on the destruction of the building by fire. *Bowhay v. Richards*..... 764

2. That the owner of a building used a wall on the land of an adjoining proprietor to support his building before it was destroyed by fire is not notice to a purchaser of the property on which the wall is situated of a stipulation in an unrecorded contract that the owner of such building might renew the use of such wall if destroyed and rebuilt. *Bowhay v. Richards* 764

Payment. See PLEADING, 12, 15.

Physicians and Surgeons.

1. Complaint filed before the state board of health to procure an order revoking the license of a physician, *held* sufficient, if it informs him of the nature of the wrong and the particular instance of its perpetration. *Munk v. Frink*..... 631

2. A trial before the state board of health to revoke a physician's license need not be conducted with the exactness of a criminal trial. *Munk v. Frink*..... 631

3. In a proceeding before the state board of health to revoke a physician's license for procuring or aiding in procuring a criminal abortion, it is not necessary to either allege or prove that the woman had become quick. *Munk v. Frink*.. 631

4. A conviction in a court is not a condition precedent to proceedings by the state board of health against a physician to revoke his license. *Munk v. Frink*..... 631

Physicians and Surgeons—*Concluded.*

5. Findings of the state board of health will be upheld, unless there is no evidence to sustain them. *Munk v. Frink*..... 631
6. The power conferred on the state board of health to revoke a physician's license is an administrative function, and the limit of judicial interference is to protect the accused in his right to a hearing on specific charges after reasonable notice and a full opportunity to present his defense. *Munk v. Frink* 631

Pleading. See APPEAL AND ERROR, 32. BANKRUPTCY, 1, 2, 4. DIVORCE, 4. FRAUD, 1. LIBEL AND SLANDER, 3, 4. TAXATION, 9, 10.

1. Where in a foreclosure suit a mortgagee offers to pay the amount due the holder of a tax sale certificate, who is a party to the suit, such tax purchaser cannot plead the statute of limitations against the mortgage. *Neill v. Burke*.... 125
2. Where, in a foreclosure suit, the allegation concerning a defendant is that he has some interest in the premises, he cannot present the defense of limitations by demurrer, nor without alleging facts showing such interest as entitles him to that defense. *Neill v. Burke*..... 125
3. In an action on account, the plaintiff should sue in his Christian name. *Patrick v. Norfolk L. Co*..... 267
4. Defendant cannot, by objecting to evidence, take advantage of the fact that plaintiff has not sued in his Christian name. *Patrick v. Norfolk L. Co*..... 267
5. Petition *held* to state a cause of action only for goods and merchandise sold and delivered. *Cooper & Cole Bros. v. Whitham* 511
6. Where the assumption of a risk not ordinarily incident to the services is relied on as a defense in an action against the master for negligence, it must be specially pleaded. *Maxson v. Case T. M. Co*..... 546
7. In determining whether a general demurrer should be sustained to an amended petition, the court will not look beyond the pleading against which the demurrer is directed. *Robert v. Hefner* 460
8. Judgment on a general demurrer must go against the party whose pleading was first defective in substance. *Bank of Miller v. Moore* 566
9. A petition for relief on the ground of fraud, which shows the action was not commenced within four years and fails to show plaintiff did not know of the fraud until within four years of the action, is demurrable. *Bank of Miller v. Moore*, 566
10. Where plaintiff prays relief because of fraud, and the petition is demurrable because of limitations, an answer that

Pleading—*Concluded.*

the cause of action did not accrue within four years is a good plea of limitations as against a general demurrer. *Bank of Miller v. Moore*..... 566

11. It is not error to overrule a motion for a more specific statement that ought not to be allowed substantially as presented. *Keys v. Fink*..... 571

12. A general allegation that a demand has been paid, *held* sufficient to permit evidence of payment to the person entitled to the money and in an amount sufficient to satisfy the debt. *Keys v. Fink*..... 571

13. Pleadings will be liberally construed when attacked for the first time in the supreme court. *Allen v. Estate of Allen*... 600

14. Where a petition shows that notes sued on are barred by limitations, and the answer alleges the bar as a defense, the reply alleging matter in avoidance, plaintiff cannot urge that a judgment of dismissal is not supported by the pleadings. *Allen v. Estate of Allen*..... 600

15. Money paid by mistake may, in some cases, be recovered in an action at law, but the mistake must be pleaded and proved. *Farmers & Merchants I. Co. v. Brumbaugh*..... 641

16. In passing on a demurrer to a petition, the court will consider an exhibit made a part thereof, if it either aids the petition or charges facts going to avoid liability. *Carson v. City of Hastings*..... 681

17. In an action for personal injuries, where the complaint alleged several elements of damages, the last one being for $25 for medical attendance, which was followed by an averment that plaintiff was thereby damaged in the sum of $2,043, *held* that the petition did not limit recovery to the item of medical attendance. *Carlile v. Bentley*..... 715

18. Objection to defect of parties appearing on the face of the petition must be raised by demurrer or it will be waived. *Bishop v. Huff*..... 729

19. The rule that, under the code, pleadings should be liberally construed does not apply in an application for an extraordinary writ. *Bishop v. Huff*..... 729

20. Where an amended petition does not entitle plaintiff to further or different relief, it is not error to strike it from the files. *Butler v. Libe*..... 740

21. One claiming under a chattel mortgage must plead the facts creating his interest and right of possession. *Pennington County Bank v. Bauman*..... 782

22. After verdict, an answer in a libel suit treated by the parties and the court as adequate will not be held bad. *Sheibley v. Fales*..... 795

Principal and Agent.

1. Where an agent receives notice in his private capacity of facts not then concerning his principal, but afterwards acts for the principal in a matter in which such facts are material, the notice should be imputed to the principal. *Henry v. Omaha Packing Co*..... 237
2. Where the act of an agent is void unless his authority is in writing, one dealing with him is bound with notice of the terms of the instrument creating the power, and a contract beyond its scope is not binding on the principal. *Miller v. Wehrman* 388
3. Where an agent negotiates a sale of real estate for the broker, with whom the purchaser makes a contract, he is not liable for a return of the purchase price, where the vendor fails to make a conveyance. *McNeny v. Campbell*.. 754

Process.

1. The court acquires jurisdiction on proper service of summons, and it is immaterial that the officer does not make return until after the answer day. *Pitman v. Heumeier*.... 338
2. To authorize summons to another county in a personal action for money, there must be an actual right to join the resident and nonresident defendants. *McNeny v. Campbell*, 754

Quieting Title.

1. Where one who occupies land as owner has become owner, by adverse possession, of an adjoining strip, and conveys said land by general description, and delivers possession of the whole tract, both grantor and grantee believing that such strip is included in the deed, the grantee is entitled to have his title quieted as against his grantor and the owner of the fee of such strip. *Rice v. Kelly*..... 92
2. Evidence *held* to sustain decree for plaintiff. *Miller v. Wehrman* 388

Railroads.

1. To deny to the state the power to require the erection of depots, the construction of side-tracks and other facilities required by the public would enable railroad companies to create a monopoly in handling products. *State v. Missouri P. R. Co*..... 174
2. The duty of maintaining a railroad so as not to unnecessarily injure adjoining proprietors is a continuing one, and is assumed by a lessee. *Morse v. Chicago, B. & Q. R. Co*... 745
3. In consideration of their franchises, railroad companies agree to perform certain duties toward the public, and the power of determining those duties and enforcing their performance is vested in the courts. *State v. Missouri P. R. Co.* 174

Rape.

1. Where defendant produces evidence assailing prosecutrix' character, evidence of her previous good character for chastity may be introduced to discredit such testimony. *Leedom v. State*..... 585
2. Certain letters written by defendant to prosecutrix, *held* admissible to corroborate her testimony on the specific charge in the information. *Leedom v. State*..... 585
3. Evidence of other acts of intercourse subsequent to the act charged, *held* admissible. *Leedom v. State*..... 585
4. An instruction that the jury must be satisfied, beyond a reasonable doubt, that the prosecutrix was not previously unchaste, *held* sufficient. *Leedom v. State*..... 585

Receivers.

1. Where the separate mortgages of different owners are sought to be foreclosed in the same action, the court may appoint a receiver of one or more of the mortgagees according to their respective rights. *Goddard v. Clarke*..... 373
2. Where a receiver is appointed to collect the rents of mortgaged property for the benefit of a junior mortgagee, a senior mortgagee, who does not object, may not, after sale, have such order modified so as to secure the benefit of the rents collected thereunder. *Goddard v. Clarke* 373
3. Where a fraternal beneficiary association organized in another state is carrying on its business in this state, the courts of this state can appoint a receiver of such association. *Starr v. Bankers U. O. W*..... 377
4. The recital of jurisdictional facts in an order appointing a receiver *held prima facie* evidence of their existence. *Starr v. Bankers U. O. W*..... 377

Replevin.

1. In replevin to recover corn, instructions *held* proper. *Gravert v. Goothard* 99
2. Evidence in an action to replevy corn *held* to sustain judgment for defendant. *Gravert v. Goothard*..... 99
3. A mortgagee of chattels cannot maintain replevin against a stranger unless as between mortgagor and mortgagee he has the right of possession. *Pennington County Bank v. Bauman* 782

Sales.

1. Where one expends money in the improvement of property before discovering the fraud by which he was induced to purchase it, or where the purchase is made on a warranty of fitness, and repairs are required before the article can be tested, the purchaser may rescind, and recover the reasonable cost of improving the property. *Mundt v. Simpkins*, 1

Sales—*Concluded.*

2. A sale of personalty with a warranty of fitness may be treated as a sale on condition subsequent, and on breach of the warranty the property may be restored and the sale rescinded. *Mundt v. Simpkins* 1

3. To effect a rescission, goods must be returned to the place where accepted, unless an offer to return them is refused. *Mundt v. Simpkins* 1

4. Where posts are sold by a particular description, such description is part of the contract of sale, and does not constitute an implied warranty of quality. *Patrick v. Norfolk L. Co* 267

5. In an action for lime and posts sold, *held* that defendant had waived the right to object to the quality of the lime, or that the posts were deficient in dimensions or number. *Patrick v. Norfolk L. Co* 267

6. Where a vendor, fearing that the contract may be impeached for incompetency of the vendee, retakes the property and converts it, the vendee may urge rescission as a defense in an action for the price. *Boggs v. Young* 621

Specific Performance.

1. Evidence in a suit for specific performance *held* insufficient to establish the execution of the contract sued on by the wife. *Thompson v. Foken* 261

2. In a suit for specific performance, where the answer is a general denial, *held* error to quiet defendant's title against plaintiff's claim. *Mancuso v. Rosso* 786

Statute of Frauds

1. A verbal agreement between two persons to purchase jointly a city lot will not be enforced unless there has been such a performance as to take it out of the statute of frauds. *Mancuso v. Rosso* 786

2. Evidence *held* not to show such part performance as to take a contract for the purchase of land out of the statute of frauds. *Mancuso v. Rosso* 786

Statutes. See FEES.

1. Where two statutes dealing with similar subjects do not conflict, the later statute will not work a repeal of the earlier one. *Holton v. Sampson* 30

2. Ch. 59, laws 1905, known as the "Juvenile Court Bill," *held* not to repeal chapter 36, laws 1897. *Holton v. Sampson* 30

3. Ch. 193, laws 1907, providing for the purchase of statutes, *held* free from doubt or ambiguity. *State v. Junkin* 118

4. Ch. 193, laws 1907, *held* within the scope of legislative power. *State v. Junkin* 118

Statutes—*Concluded.*

5. Ch. 193, laws 1907, *held* to confer no discretion on the officers of the state as to the number of volumes of the statutes to be accepted thereunder. *State v. Junkin*..... 118
6. A law which is uniform throughout the state, acting alike on all persons and localities of a class, is not local or special legislation. *Allan v. Kennard*..... 289
7. The power of classification cannot be interfered with by the courts, unless the legislature has by an artificial classification violated the provisions of the constitution prohibiting local and special legislation. *Allan v. Kennard*..... 289
8. A substantial difference which affords a proper basis for classification exists between ordinary counties and those containing a city of the metropolitan class. *Allan v. Kennard* 289
9. An act which treats of one department of county government, the creation of a county office, and the duties of the incumbent of such office, is complete in itself, repeals by implication all acts repugnant thereto, and need not contain all sections of former acts which it may amend, nor specifically repeal the same. *Allan v. Kennard* 289
10. Ch. 37, laws 1907, providing that the county comptroller in counties containing a city of the metropolitan class shall be *ex officio* city comptroller, *held* not the inducement for the enactment of ch. 36, laws 1907, creating the office of county comptroller in such counties. *Allan v. Kennard*..... 289
11. Chapters 33, 36 and 38, laws 1907, *held* cognate acts, carrying out the legislative purpose to create the office of county comptroller in counties containing a city of the metropolitan class, and providing for carrying out the duties of such office, and that said acts are valid. *Allan v. Kennard*..... 289

Taxation. See COUNTIES AND COUNTY OFFICERS, 1, 2.

1. To arrive at net credits for assessment, a taxpayer can deduct from his gross credits only *bona fide* debts. *Hoagland v. Merrick County*..... 83
2. The state board of equalization and assessment acts in a *quasi* judicial capacity, and its action is not subject to collateral attack, except for fraud or for the exercise of power not conferred upon it by law. *State v. State Board of Equalization and Assessment*..... 139
3. The word credits as used in sec. 28, art. 1, ch. 77, Comp. St. 1903, means net credits, therefore the indebtedness of a taxpayer may be deducted from gross credits to find the true value for assessment. *Oleson v. Cuming County*..... 209
4. A note and mortgage taken in exchange for property is not "money loaned and invested," within Comp. St. 1903, sec. 28,

Taxation—*Continued.*

art. I, ch. 77, but is a "credit," from which the holder may deduct his debts. *Oleson v. Cuming County*..... 209

5. A mutual insurance company in listing its property for taxation, *held* entitled to set off the amount of its outstanding benefit certificates against securities in its reserve fund set apart for the payment of such certificates. *Scandinavian Mutual Aid Ass'n v. Kearney County*..... 468

6. The revenue law which permits a taxpayer to deduct his *bona fide* debts from the gross credits, *held* not in conflict with sec. 1, art. IX of the constitution. *Scandinavian Mutual Aid Ass'n v. Kearney County*..... 473

7. The action of the state board of equalization and assessment is a final order, which may be reviewed in the district court by petition in error. *State v. State Board of Equalization and Assessment* 139

8. At the time fixed by the state board of equalizaion and assessment for valuing and assessing railroads, a railroad company may request special findings, object to rulings and take exceptions; but to obtain a review, it must preserve the same by bill of exceptions. *State v. State Board of Equalization and Assessment*..... 139

9. Under the revenue law in force in 1901, a petition by a county to foreclose a tax lien, which fails to allege an antecedent sale, does not state a cause of action, but the judgment is not void, and that the party claiming under such judgment knew there had not been an antecedent sale does not make an exception to the rule. *Cass v. Nitsch*..... 228

10. In an action to set aside a sheriff's deed because the order confirming the sale was made by a judge disqualified to act, an allegation that plaintiffs are owners in fee simple of the land is a sufficient plea of ownership to resist a general demurrer. *Harrington v. Hayes County*..... 231

11. Proof of payment of taxes may be made by production of the original receipt or by any other evidence sufficient to satisfy court or jury of the fact of payment. *Keys v. Fink*..... 571

12. Where it is the duty of a mortgagor to pay taxes, neither he nor his assigns can acquire any right against the mortgage by purchasing at a tax sale. *Pitman v. Boner*..... 736

13. The right of redemption from tax sales under sec. 3, art. IX of the constitution, applies to judicial as well as to administrative sales, and redemption may be made on payment of the amount of the bid, with 12 per cent. interest, together with subsequent taxes paid and interest. *Butler v. Libe*.... 740

14. Where illegal taxes are included in a default decree rendered under art. IX, ch. 77, Comp. St. 1907, and suitable objections

Taxation—*Concluded.*

are made to a motion to confirm, the motion should be denied, and the error in the decree corrected. *State v. Several Parcels of Land*..... 770

15. A proceeding which deprives a person of his property by means of a void tax is gross injustice within the meaning of subd. 5, sec. 39, art. IX, ch. 77, Comp. St. 1907. *State v. Several Parcels of Land*..... 770

Tender.

To make a tender effective one must, when sued, not only plead the tender, but bring the amount into court. *Portsmouth Savings Bank v. Yeiser*..... 343

Trial. See APPEAL AND ERROR. CRIMINAL LAW.

1. It is not reversible error to refuse to permit counsel, when addressing the jury, to discuss immaterial evidence. *Gandy v. Estate of Bissell*..... 102

2. The party first required to produce evidence is entitled to open and close the argument. *Kraus v. Clark*..... 575

3. When the publication of a libel actionable *per se* is admitted and justification pleaded, the burden is on defendant, and he has the right to open and close. *Sheibley v. Fales*..... 795

4. An instruction that, if a certain witness is of bad reputation for truth, that fact tends to discredit his testimony, and the jury may disregard it, except as corroborated, *held* proper. *Johnson v. Johnson*..... 60

5. In an action for personal injuries, an instruction allowing the jury to assess damages for permanent injuries, without evidence in support thereof, *held* erroneous. *Johnson v. Johnson* 60

6. Evidence in an action for goods sold *held* to justify directing verdict for plaintiff. *Patrick v. Norfolk L. Co*..... 267

7. Requested instruction *held* properly refused where there was no issue to which the charge referred on which the court had not given suitable instructions. *Buel v. Chicago, R. I. & P. R. Co*..... 430

8. To refuse an instruction not applicable to the evidence *held* not error. *Odell v. Story* 442

9. Requested instructions covered by those given, *held* properly refused. *Piper v. Neylon*..... 481
Maxson v. Case T. M. Co..... 546
Joyce v. Miller 578
Billingsley v. Dutton 667

10. Where requested instructions correctly state the law on the issues and evidence, it is error to refuse them, unless the

Trial—*Concluded.*

points are covered by instructions given. *Strubble v. Village of DeWitt*..... 504

11. Mere failure to charge on a particular proposition *held* not reversible error, unless a suitable instruction has been tendered. *Maxson v. Case T. M. Co*..... 546

12. It is within the discretion of the court to give or refuse to submit special findings. *Maxson v. Case T. M. Co*..... 546

13. An instruction responsive to the issues and evidence cannot be successfully assailed. *Joyce v. Miller*..... 578

14. Where the evidence shows that a party who has purchased a water right has voluntarily paid one year's maintenance charges, and agreed to pay an annual maintenance fee of a like amount, and suit is brought for subsequent maintenance fees, it is error to withdraw the case from the jury. *Farmers & Merchants I. Co. v. Brumbaugh*..... 641

15. In an action on a note, where there is no competent evidence to prove defense of payment by delivery of property to a third person, it is error to submit that issue. *First Nat. Bank v. Brown*..... 669

16. A party is not entitled to a reversal because of a defective instruction, which, with another given at his request, fairly submits his theory of the case. *Morrow v. Barnes*..... 688

17. In an action for personal injuries, it is error to submit the question of damages for loss of time, when there is no evidence of value of time lost. *Carlile v. Bentley*..... 715

18. It is proper to withdraw from the jury an affirmative defense not sustained by any evidence. *Carlile v. Bentley*... 715

19. It is not error to refuse instructions, the substance whereof has been included in instructions given. *Perrine v. Union Stock Yards Co*..... 790

20. Where different minds may reasonably draw diverse conclusions as to whether certain facts establish negligence or contributory negligence, those issues must be submitted to the jury. *Perrine v. Union Stock Yards Co*..... 790

21. Where different minds may draw different conclusions as to whether admitted facts prove negligence, the question is for the jury. *Henry v. Omaha Packing Co*..... 237

22. Negligence is for the jury. *Morse v. Chicago, B. & Q. R. Co.*, 745

23. An instruction is not necessarily prejudicially erroneous because obscure, where another on the same point is clear and correct. *Sheibley v. Fales*..... 795

Trover.

One who aids in the wrongful taking of chattels is liable for their conversion, though he acted as agent. *Starr v. Bankers U. O. W.* 377

Trusts. See WILLS, 1, 2.

1. Where a mother, during her last illness, conveys her real estate to her husband on his oral promise to devise it to their demented child, equity may, to prevent a wrong, declare the grantee a trustee *ex maleficio* for the protection of the intended beneficiary. *Schneringer v. Schneringer* 661

2. Where, in persuance of such agreement, the father made a will complying with his agreement, *held* that he will not be permitted to revoke the will or incumber or sell the real estate to the detriment of his incompetent child. *Schneringer v. Schneringer* 661

Vendor and Purchaser. See FRAUD, 2.

1. Where, in a suit to foreclose a land contract, the vendee seeks to enforce the contract and pleads a tender, he thereby admits that the vendor is entitled to a decree for the amount tendered. *Portsmouth Savings Bank v. Yeiser* 343

2. A vendee is entitled to nominal damages only where limitations in the vendor's title do not affect the market value. *Portsmouth Savings Bank v. Yeiser* 343

3. A decree foreclosing a vendor's lien should provide that the vendor convey on payment of the decree. *Portsmouth Savings Bank v. Yeiser* 343

4. A purchaser is not authorized to rely on an opinion of the owner as to boundaries or his statement of the distance from a known to an unknown corner, but must ascertain for himself the true boundary. *Odell v. Story* 437

5. In an action to recover a remainder of the price of a farm, evidence that defendant was plaintiff's agent and had an offer in excess of the price for which he purchased is immaterial. *Waters v. Phelps* 674

6. Where one can acquire title to land either by the voluntary act of the parties holding the title or by suit, he can make a valid agreement to sell it, and the fact that the purchaser understood him to hold legal title is not ground for rescission of the contract. *McNeny v. Campbell* 754

Venue.

1. When an impartial trial cannot be had in the county where suit is brought, it is the duty of the court to send the cause to an adjoining county for trial. *Gandy v. Estate of Bissell,* 102

2. In allowing a change of venue, the court is not limited to

Venue—*Concluded.*

an adjoining county, but where the showing is sufficiently strong as to such county the case should be sent to a county where the alleged prejudice does not exist. *Gandy v. Estate of Bissell* 102

Waters.

1. A railroad company must so construct its bridges across natural watercourses and its roadbed as to allow the passage of such flood waters as reasonably occur. *Smith v. Chicago, B. & Q. R. Co*..... 186
2. Where defendant filled a creek causing damage to plaintiff's property, the measure of recovery is the difference in the fair market value of his property immediately before and after the injury. *McClure v. City of Broken Bow*..... 384
3. On the trial of an action for damages caused by obstructing a stream, witnesses may testify to the cost of restoring property, but the jury cannot allow such cost in addition to general damages, nor can the possibility of future overflows and further injury be considered. *McClure v. City of Broken Bow* 384
4. Where, in an action against a railroad for damages to live stock and crops from high water, the defense is that it was the act of God, the burden is on defendant to establish such defense. *Buel v. Chicago, R. I. & P. R. Co*..... 430

Wills. See CHARITIES.

1. Where real estate was devised on condition, with reversion to heirs on failure thereof, the condition having failed, *held* that the title vested in the heirs. *Clark v. Fleischmann*.... 445
2. Legal title to real estate *held* to vest in the executor and trustee until the trust created by the will was discharged. *Clark v. Fleischmann* 445
3. An executor cannot sell real estate unless an express power of sale is given by the will, or it is necessary in order to carry out the testator's intention. *Clark v. Fleischmann*.. 445
4. Will construed. *In re Estate of Nilson* 809